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United Nations

Report of the United Nations Commission on International Trade Law

on the work of its twenty-sixth session

5–23 July 1993

General Assembly
Official Records • Forty-eighth Session
Supplement No. 17 (A/48/17)

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-sixth session, held at Vienna from 5 to 23 July 1993.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-sixth session on 5 July 1993.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII) the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 19 October 1988 and on 4 November 1991, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

Argentina (1998), Austria (1998), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1998), China (1995), Costa Rica (1995), Denmark (1995), Ecuador (1998), Egypt (1995), France (1995), Germany (1995), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (1995), Kenya (1998), Mexico (1995), Morocco (1995), Nigeria (1995), Poland (1998), Russian Federation (1995), Saudi Arabia (1998), Singapore (1995), Slovak Republic (1998), Spain (1998), Sudan (1998), Thailand (1998), Togo (1995), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (1995), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Costa Rica, Kenya, Togo, Uganda and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Albania, Armenia, Australia, Bangladesh, Belarus, Belgium, Bolivia, Brazil, Colombia, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Ethiopia, Finland, Gabon, Guatemala, Holy See, Indonesia, Jordan, Kuwait, Libyan Arab Jamahiriya, Malaysia, Nicaragua, Paraguay, Peru, Republic of Korea, Romania, Slovenia, South Africa, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Turkey, Ukraine and Venezuela.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

International Monetary Fund (IMF)
World Bank

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee (AALCC)
Banque africaine de développement (BAfD)
International Institute for the Unification of Private Law (UNIDROIT)

(c) Other international organizations

Cairo Regional Centre for International Commercial Arbitration
Grupo Latinoamericano de Abogados para el Derecho de Comercio Internacional (GRULACI)
Inter-American Development Bank
Organization of African Unity
World Assembly of Small and Medium Enterprises (WASME)

C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. Sani L. Mohammed (Nigeria)

Vice-Chairmen: Mrs. Ana Isabel Piaggi-Vanossi (Argentina)
Mr. Rossen Hristov Guenchev (Bulgaria)
Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Visoot Tuvayanond (Thailand)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 493rd meeting, on 5 July 1993, was as follows:

1. Opening of the session.
2. Election of the officers.
3. Adoption of the agenda.
4. New international economic order: procurement.
5. Electronic data interchange.
6. International contract practices: draft Convention on International Guaranty Letters.
7. Case law on UNCITRAL texts (CLOUT).
8. Future programme of work.
9. Coordination of work.
10. Status and promotion of UNCITRAL legal texts.
11. Training and assistance.
12. General Assembly resolutions on the work of the Commission.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 519th meeting, on 23 July 1993, the Commission adopted the present report by consensus.

II. DRAFT MODEL LAW ON PROCUREMENT

A. Introduction

11. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 1/ The Working Group carried out its work at its tenth to fifteenth sessions (the reports on the work of the Working Group at those sessions are contained in documents A/CN.9/315, A/CN.9/331, A/CN.9/343, A/CN.9/356, A/CN.9/359 and A/CN.9/371). The Working Group completed its work by adopting the draft text of a Model Law on Procurement at the close of its fifteenth session. The Working Group also agreed that a draft commentary giving guidance to legislatures enacting the Model Law should be prepared by the Secretariat, without precluding the possibility of preparation at a later stage of commentaries with other functions (A/CN.9/359, para. 249).

12. The text of the draft Model Law as adopted by the Working Group at its fifteenth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in A/CN.9/376 and Add.1 and 2. The Secretariat prepared a draft Guide to Enactment of the Model Law on Procurement (A/CN.9/375), an earlier draft of which had been reviewed by a small and informal ad hoc working party of the Working Group (Vienna, 30 November-4 December 1992).

13. Before entering into a substantive discussion of the articles of the draft Model Law, the Commission considered its method of work, in particular whether both the draft Model Law and the draft Guide to Enactment should be adopted by the Commission or whether only the draft Model Law would be adopted by the Commission, while the draft Guide to Enactment would be published as a Secretariat document. The Commission decided that the draft Guide to Enactment should be discussed and adopted by the plenary of the Commission as it considered that the adoption of the Guide to Enactment by the Commission would make it more authoritative when considered by legislatures. The Commission also decided to proceed with the consideration of the draft Model Law as contained in the annex to document A/CN.9/371 and to defer the consideration of the draft Guide to Enactment until it had completed its consideration of the draft Model Law.

14. The Commission, at the initial stage of its deliberations, agreed that the title of the draft Model Law should be changed to "UNCITRAL Model Law on Procurement" so that the title would be consistent with the titles of other model laws prepared by the Commission. Subsequently, the Commission agreed to further modify the title to read "UNCITRAL Model Law on Procurement of Goods and Construction". The Commission also agreed that, upon completion of its consideration of the Model Law and the Guide to Enactment, it would consider such questions as whether the Model Law and the Guide to Enactment should be published in a joint document or separately and whether, in a separate publication of the Model Law, to include a footnote reference to the Guide.

15. The Commission expressed its appreciation to the Working Group on the New International Economic Order and its Chairmen, Robert Rufus Hunja (Kenya) and Leonel Pereznieto Castro (Mexico), for having prepared a draft of the Model Law that was generally favourably received and regarded as an excellent basis for the discussion in the Commission. The Commission also expressed its appreciation to the Secretariat.

B. Discussion of articles

Preamble

16. The Commission adopted the preamble unchanged.

Article 1. Scope of application

17. A proposal was made to delete article 1 (2) (a). In support of the proposal, it was stated that States were now applying increasingly transparent procedures for procurement involving national security or national defence and that it was not desirable for the Model Law to appear to recommend the preclusion of such procurement in all instances. It was suggested that any States that wished to preclude such procurement would still be able to do so under paragraph (2) (b) and (c).

18. Concerns were expressed, however, that procurement for national security purposes remained of a sensitive nature for many States and that, in order to preserve the acceptability of the Model Law and to foster its widest possible application, it was important to mention expressly the right of States to exclude such procurement from the application of the Model Law, even though the effect of the deletion of paragraph (2) (a) might be largely cosmetic. The prevailing view was, therefore, that paragraph (2) (a) should be retained. At the same time it was emphasized that, since the goal was to have as much procurement as possible regulated by the Model Law, the Guide to Enactment of the Model Law could point out to enacting States that the exclusion of procurement involving national security was optional and that this and any other exclusions under article 1 (2) should be applied as narrowly as possible. A suggestion to amend paragraph (3) to enable the procurement regulations to state the extent to which the procurement referred to in paragraph (2) would be subject to the Model Law did not receive sufficient support.

19. After deliberation, the Commission adopted article 1 unchanged.

Article 2. Definitions

"Procurement" (subparagraph (a)) and "procuring entity" (subparagraph (b))

20. The Commission adopted the definitions of "procurement" and "procuring entity" unchanged.

"goods" (subparagraph (c))

21. The Commission considered a proposal to include in the definition of "goods" an option for specific inclusion by States of some things and the specific exclusion of others. The intent of this proposal was to provide increased clarity and transparency and to lessen the possibility of disputes with respect to the status of certain items, such as printing, that might be regarded in some jurisdictions as goods and in other jurisdictions as a service. It was suggested to this end that the following optional language might be added within square brackets at the end of the existing text of the definition: "[and, without limiting the generality of the foregoing, includes ..., but does not include ...]".

22. While there was general sympathy for achieving the goal of added clarity with respect to borderline cases such as printing, the proposal evoked the concern that mentioning the possibility of exclusion in the definition of

"goods" might have the unintended effect of encouraging exclusions of the application of the Model Law; it was said that exclusion of the Model Law was already amply provided for in article 1 and should not be further provided for by way of definition. In response to this concern, it was emphasized that the intent of the proposal was to provide clarity with respect to what was and what was not to be considered "goods", and not to limit the scope of application of the Model Law.

23. Taking into account the above exchange of views, the Commission considered several additional proposals in an attempt to achieve such added clarity. One proposal was to add to article 1 (2) editorial language indicating that enacting States could at that point in the Model Law include those things that were goods and those that were not deemed to be goods. Support for that proposal failed to solidify, in particular since such an approach was felt to be excessively at variance with the present structure of the Model Law, in which article 1 (2) dealt solely with exclusions and the definition of goods covered was found in article 2 (c). It was also generally felt that such a modification would be superfluous since article 1 (2) already provided a sufficient modality for the exclusion of specific types of procurement. Another proposal, aimed at addressing the concern about unduly fostering exclusion of the Model Law, was simply to include in the definition of goods express mention of printing and other borderline cases such as computer software. This would permit an enacting State to forego incorporation of those items if they were traditionally considered to be services and would leave the matter of exclusions to be addressed in article 1. Yet another proposal was to make the definition of "goods" generally clearer by replacing the word "includes" by the words "includes such items as" so as to make it clear that the definition was not exhaustive. This proposal was not regarded as delivering much additional clarity since it was generally felt that the word "included" would already be understood in a non-exhaustive sense.

24. As an outcome of the discussion of the advantages and disadvantages of the various proposals, the Commission was able to reach a consensus in favour of adding editorial language along the following lines at the end of the definition of "goods", language which would refrain from making any reference to exclusions, while permitting enacting States to treat as goods certain types of goods whose status might otherwise be unclear: "[enacting States may include additional categories of goods]". Subject to that modification, the Commission adopted the definition of "goods".

"construction" (subparagraph (d))

25. The Commission adopted the definition of "construction" unchanged.

"supplier or contractor" (subparagraph (e))

26. It was proposed that reference could be made throughout the Model Law simply to "supplier". In favour of this approach it was pointed out that the Model Law did not appear to differentiate at any particular point between suppliers and contractors. However, it was pointed out that in some situations the party would be thought of as a "supplier" in business usage, but as a "contractor" in other situations. It was therefore felt that use merely of the term "supplier" would be too narrow. It was further stated that the matter had been discussed by the Working Group and that it had not turned out to be possible to come up with a more suitable expression than "supplier or contractor". The Commission, noting that a term such as "tenderer" would not be appropriate since the Model Law provided for a variety of methods of procurement in addition to tendering proceedings, decided to retain the existing expression.

"procurement contract" (subparagraph (f))

27. The Commission adopted the definition of "procurement contract" unchanged.

"tender security" (subparagraph (g))

28. The Commission accepted and referred to the drafting group a proposal to expand the definition to refer to the two functions of tender securities mentioned in article 27 (1) (f) (i) and (iii) but not presently referred to in the definition of "tender security", which mentioned only the function of securing the obligation of the successful supplier or contractor to enter into a procurement contract.

"currency" (subparagraph (h))

29. The Commission adopted the definition of "currency".

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

30. The Commission adopted article 3 unchanged.

Article 4. Procurement regulations

31. A suggestion was made to include in article 4 a new paragraph along the following lines to clarify that the Model Law did not preclude the use of electronic data interchange (EDI) in communications governed by the Law:

> "(2) In addition to the procurement regulations referred to in paragraph (1), (the organ or authority specified in paragraph (1), or another specified organ or authority) is authorized to promulgate procurement regulations allowing for the use of electronic data interchange with respect to procurement by procuring entities. Such regulations may deal with any matter dealt with in articles 9, 10, 32 or any other article of this law, and specifically may vary the requirements in article 25 (5) of a writing and a sealed envelope for the submission of a tender, provided that the confidentiality provided by such writing and such sealed envelope shall be preserved and that the record and other requirements of article 9 are satisfied."

32. The Commission decided to consider the proposal in the context of articles 9, 10 and 25 (see para. 63).

Article 5. Public accessibility of legal texts

33. The Commission adopted article 5 unchanged.

Article 6. Qualifications of suppliers and contractors

Paragraph (1)

34. The Commission adopted paragraph (1) unchanged; however, it later decided to restructure paragraphs (1) and (2) of article 6 (see para. 201).

Paragraph (2) (a), (b) and (c)

35. The Commission adopted paragraph (2) (a), (b) and (c) unchanged; however, it later decided to restructure paragraphs (1) and (2) of article 6 (see para. 201).

Paragraph (2) (d)

36. A suggestion, which received some support, was to replace the words "in this State" by the words "in any State"; the purpose of the proposal was to enable the procuring entity to obtain and evaluate information about possible failures by suppliers to pay taxes or social security obligations not only in the State of the procuring entity but also in foreign States. Such failures in foreign States might be of concern to a State seeking to limit the risk of entering into contractual relations with an irreputable supplier or contractor. The suggested modification was opposed on the ground that it might open a possibility of disqualifying suppliers that were legitimately disputing their obligation to pay a tax, and that such a ground for disqualification might therefore be abusively applied. It was stated in reply that the modified provision should make it clear that the subparagraph was oriented not to persons legitimately disputing their tax or social security obligations but to persons evading those obligations; such a clarification might be made by inserting the word "lawful" in front of the word "obligations". After discussion, and noting that the word "lawful" would not eliminate the danger of improper disqualifications of suppliers, the Commission did not adopt the suggestion. The subparagraph was adopted unchanged.

Paragraph (2) (e)

37. It was proposed to add, after the words "within a period of ... years", the words "or while a sentence is being served for the offence, whichever is the greater". The purpose of the proposed addition was to avoid the anomalous situation of qualifying a firm while its current principal was, based on a conviction before that period, still incarcerated for an offence of the type referred to in the subparagraph. In opposition to the addition, it was thought that the modified text might be interpreted in such a way that a firm would be disqualified for the entire period during which one of the firm's former principals was incarcerated; furthermore, it was said that, while the modified paragraph might in fact be construed as applicable only when current principals were incarcerated, the anomalous situation sought to be avoided by the addition was at any rate unlikely to arise since in practice a conviction for a criminal offence would normally lead to the resignation or removal of the principal concerned. The supporters of the proposal agreed that the modified text should apply, as the current text did, only when current principals were sentenced and, in order to remove any doubt, suggested inclusion of words making that abundantly clear.

38. An observation was made that the purpose of the subparagraph was generally to give the possibility to the procuring entity to establish that the supplier was of "good character", and it was suggested that the use of words along the lines of "good character" in the subparagraph might provide the desired flexibility to the procuring entity in evaluating the circumstances of the case, including the possibility that a current principal would be incarcerated for longer than the number of years specified in the subparagraph. The suggestion was opposed on the ground that it would make the provision too vague.

39. After discussion, the Commission decided to adopt the subparagraph unchanged.

Paragraphs (3), (4) and (5)

40. The Commission adopted paragraphs (3), (4) and (5) unchanged.

Paragraphs (6) and (7)

41. The Commission considered a number of proposals relating to the nature of defects in qualification information that would provide grounds for disqualification and the extent to which any such defects should be permitted to be rectified. It was proposed that paragraph (6) should contain a provision restricting the procuring entity from disqualifying suppliers or contractors owing to minor errors or omissions and that this should be extended even to instances where prequalification proceedings had taken place. To that end it was argued that the procuring entity should allow suppliers or contractors to correct such minor errors or omissions and that this would limit abusive disqualification on inconsequential grounds. Another proposal that was generally aimed at restricting the right of the procuring entity to disqualify suppliers or contractors for minor errors or omissions was to state in the Model Law that the procuring entity could only disqualify for "substantial" inaccuracies. It was further proposed that, since paragraph (7) apparently referred to instances where no information had been provided, paragraph (6) should also refer to the situations where the supplier or contractor submitted incomplete information in addition to the current reference to false and inaccurate information. This latter proposal was accepted.

42. The Commission was of the view that the proper test with which to limit the right of the procuring entity to disqualify suppliers or contractors would be whether the inaccuracy or incompleteness of the information was "material" or not. It was felt that the word "substantial" might be imperfect and may lead to disputes. A concern was, however, expressed that this test of whether the inaccuracy was material or not for purposes of disqualification should not apply to false information as false information was understood to be information that was deliberately false and should therefore not be qualified in any respect as this would give an aura of acceptance to false information. A proposal to clarify this by adding the word "intentionally" before the word "false" did not gain support as it was felt that this would entail investigating the motives of the supplier or contractor.

43. The Commission then took up the issue of whether the supplier or contractor should have the right to rectify false, inaccurate or incomplete information. There was general agreement that there should be no right to correct false information as this would be open to abuse and provide opportunity for fraud. As regards material inaccuracies or incomplete information, one view was that the supplier or contractor should not have the right to correct material inaccuracy or incompleteness of information but should be entitled to make corrections or make complete information that was not material. Another view was that the additional reference in paragraph (6), to disqualification of a supplier or contractor for material inaccuracy or incompleteness of information, should be made subject to paragraph (7) of article 6 so as to enable the supplier or contractor to correct defects by providing accurate and complete information; paragraph (7) would enable him to provide proof of information that was required under paragraph (2).

44. Yet another view was that, as currently stated, paragraph (7) dealt with situations where the supplier or contractor provided proof of qualification before the deadline for submission and was not intended to deal with the issue of allowing corrections. Another view was that paragraph (7) should also apply where prequalification proceedings had taken place. A view was also expressed that the substance of paragraph (7) should be relocated to paragraph (2) as it

only concerned provision of information that was required under paragraph (2). Yet another suggestion was that paragraph (7) could be deleted as it served no purpose after the amendments made to paragraph (6), which now dealt with instances of incomplete information.

45. After deliberation, the Commission decided that paragraph (7) should be retained, in its present place, and that it should be expanded to allow the supplier or contractor to make corrections of material inaccuracy or incompleteness of information. It was felt that this would fit in with paragraph (6) in which it was already implicit that the procuring entity could not disqualify a contractor or supplier for immaterial inaccuracies or incompleteness of information.

46. A proposal was made to the effect that paragraph (7) should also provide the supplier or contractor with the right to provide evidence to rebut a claim by the procuring entity that the information it had provided was false. In response to this proposal it was pointed out that the supplier or contractor who felt erroneously disqualified could avail itself of the recourse proceedings under chapter V of the Model Law and that chapter V would therefore be the proper place to deal with the issue.

47. It was pointed out that the words "proposals or offers" should be reinstated after the word "tenders" in the penultimate line of paragraph (7).

48. In considering the report of the drafting group, the Commission engaged in further deliberations affecting paragraphs (6) and (7) of article 6 (see paras. 213 and 214).

Article 7. Prequalification proceedings

Paragraphs (1) and (2)

49. The Commission adopted paragraphs (1) and (2) unchanged.

Paragraph (3)

50. It was agreed that the information referred to in article 19 (1) (j), i.e., the place and deadline for the submission of tenders, should be added to the exceptions referred to in paragraph (3), as the procuring entity may not always be in a position to know that information at the time of prequalification. The Commission also noted its agreement with the Secretariat proposal that article 19 (1) (j) should be amended to the effect that the place and deadline for submission should be included in the invitation to tender and the invitation to prequalify, only if known to the procuring entity at that stage. It was further noted that, if the amendment to article 19 were adopted, the concern raised with respect to the present provision would be sufficiently addressed since it mirrored the information referred to in article 19. The Commission also requested the drafting group to consider whether it would be possible to avoid repeating similar listings of the exclusions both in article 7 (3) and in article 19 (2).

Paragraph (4)

51. It was suggested that in some countries it was not common practice to require procuring entities to transmit during the prequalification proceedings to all suppliers and contractors the clarifications of the prequalification documents as this would be excessively burdensome, unnecessary and costly. Such a procedure would be permitted but not mandated by the Model Law as it currently

was in paragraph (4). A differing view was that, in order to ensure fairness in the competition among suppliers and contractors, it would not be sufficient to provide for the circulation of clarifications of solicitation documents, without also requiring an analogous procedure at the important threshold stage of prequalification. In order to achieve a balance between these two concerns, it was suggested that the procedure be required only for "reasonable requests" or "necessary clarifications", or only for clarifications deemed "relevant" to all suppliers and contractors. Though the concern was raised that such terms raised the possibility of disputes as to interpretation, the Commission referred to the drafting group the suggestion that the duty to circulate clarifications be limited to "reasonable" requests.

Paragraph (5)

52. The suggestion was made that the second sentence of this paragraph should be redrafted to read: "In reaching that decision the procuring entity shall use only the criteria set forth in the prequalification documents." The Commission adopted the paragraph and referred the suggestion to the drafting group.

Paragraphs (6) and (7)

53. The Commission adopted paragraphs (6) and (7) unchanged.

Paragraph (8)

54. A number of questions were raised that indicated the possible need to use more precise language in paragraph (8), as well as to align it with article 6 (6). Those questions included: whether the reference to prequalification in the second sentence should be deleted as disqualification of the supplier for submission of false or inaccurate information during prequalification was covered in article 6 (6); whether, at the end of the second sentence, reference should be made to the submission of incomplete information; whether the words "failed to reconfirm" should be made more clear. The Commission referred those questions to the drafting group.

Article 8. Participation by suppliers and contractors

55. A question was raised as to why a State would enter into agreements such as the General Agreement on Tariffs and Trade (GATT) or regional free-trade agreements while at the same time giving generally free and open access to procurement to all foreign nationals. It was proposed that article 8 should rather be based on the notion of reciprocity, by providing for free participation by suppliers and contractors from States that had adopted legislation based on the Model Law and especially its article 8. While a reciprocity provision could already be applied under the existing text by way of the procurement regulations, inclusion of the reciprocity rule in the Model Law itself was said to be preferable from the standpoint of transparency.

56. A degree of misgivings was also expressed with the present approach in article 8 in that it appeared to be ambiguous. On the one hand, it established the rule of non-discrimination against foreign suppliers and contractors, while, on the other hand, the same provision provided wide latitude to enacting States to exclude that rule. It was suggested that, if such an ambiguous formulation was all that could be achieved, it might be preferable instead for the Model Law simply to remain silent on the question of non-discrimination against foreign suppliers and contractors. A view was expressed that such an approach would take better account of the needs of developing countries to maintain measures preferential to their local suppliers and contractors. Other suggestions were

that the ambiguity might be resolved by limiting the possibility of exclusions to those based on the notion of reciprocity or on the basis of the low value of a procurement, in the direction of the provision in article 17 (b).

57. In response to the above concerns and proposals, it was recalled that the Working Group had considered the question of non-discrimination at length at several sessions. The Working Group had found that the existing approach was the best possible compromise that could be achieved, in particular from the standpoint of striking a proper balance between the progressive fostering of non-discrimination and the need to recognize that enacting States would, at least for the foreseeable future, continue, to one degree or another, to apply measures designed to favour national suppliers and contractors.

58. The Commission looked favourably on a suggestion that, in order to address the concerns that had been raised about the possible ambiguity of the provision, the Guide to Enactment should make it clear that the Commission endorsed the desirability of the widest possible application of the rule of non-discrimination, while also making it sufficiently clear that the Model Law expressly provided for exclusion of that rule to the degree considered necessary by enacting States in light of their economic conditions, and their international and national legal obligations affecting procurement.

Article 9. Form of communications

Paragraph (1)

59. It was observed that, while procurement practices have traditionally relied on paper-based communications and the Model Law largely reflected those practices, it should give more latitude to and enable the use of electronic data interchange (EDI) in procurement communications. It was emphasized that the use of EDI was beginning to take hold in procurement and was the wave of the future. It was suggested that the existing text could be viewed as hindering the development of EDI applications in procurement, in particular because of the provision in article 25 (5) requiring submission of tender in writing and in a sealed envelope. Because of that provision, article 9 (1), which should be read as a provision enabling the use of EDI, was thrown into doubt.

60. At the same time, a note of caution was struck to the effect that the introduction of EDI into procurement was not a simple matter; it raised questions of security and confidentiality, as well as legal questions, for example, in the area of evidence, as a result of the application of new communications technology to traditional paper-based procedures. It was suggested that perhaps the Secretariat should prepare a note on the use of EDI in procurement, legal issues arising therefrom, and possible ways of addressing those issues.

61. The Commission was generally of the view that the text of the Model Law should be modified so as to make it abundantly clear that procuring entities were enabled to introduce EDI techniques into the procedures provided for in the Model Law. There was general agreement that any solution to be included in the Model Law as to the use of EDI should bear in mind the interests both of parties wishing to use EDI as well as of parties that were not yet ready to use EDI. In response to the concerns expressed over EDI, it was pointed out that the language of article 9 (1) should not require any particular form, only a record preserving the content of the communication, and that similar formulations appeared in other UNCITRAL texts and were generally understood to enable the use of EDI. It was also noted that technological solutions were rapidly being developed to ensure that EDI technologies employed would provide the same

juridical function as that offered by the traditional paper-based procedures. For example, it was reported to be already possible to "time seal" computers so that an EDI functional equivalent could be available for the writing and sealed envelope requirements presently imposed in article 25 (5) for the submission of tenders.

62. The Commission further noted that, as had already been seen in the deliberation of the Commission's Working Group on Electronic Data Interchange, the questions raised by the use of EDI in procurement were generally not unique to procurement. Those questions were analogous to those raised in other spheres of economic and contracting activity, and would usually be subject to general solutions, often found in existing national laws. It was also questioned whether, in this light, any additional Secretariat study was merited since, beyond generally applicable legal solutions which were already being addressed by the Working Group, there lay technological questions that were beyond the competence of the Secretariat.

63. The Commission then considered proposals aimed at improving the text from the standpoint of enabling the use of EDI. One suggested approach was to add to article 4 a new paragraph expressly authorizing adoption of regulations allowing the use of EDI in the procurement process (for the text of the proposed paragraph, see para. 31). It was noted that the purpose of the proposed text was primarily to draw the attention of States to the question of the use of EDI in procurement without providing detailed guidance as to the content of the solutions to be incorporated in the regulations. Such an approach was said to be appropriate in view of the fact that internationally harmonized solutions to legal issues in EDI had not yet emerged and that those issues were still currently under consideration by the Working Group on Electronic Data Interchange. A criticism of the proposal was that the broad latitude it left to States in determining the conditions for the use of EDI, and the lack of internationally agreed models, might lead to solutions that did not adequately heed the policies underlying the Model Law. It was further suggested that the new paragraph in article 4 might be seen as raising obstacles to the use of EDI, by suggesting that elaborate regulations might be necessary when in fact many of the apparent difficulties could easily be overcome.

64. Another approach, which won the approval of the Commission, was to provide in the Model Law itself, by an appropriate modification of articles 25 (5) and 9, for the availability of EDI. It was suggested that this might be done by making the changes presented below (paras. 8-10) and by using at the beginning of article 9 (1) the words "Subject to other provisions of this law and any requirement of form specified by the procuring entity ... ". It was stressed that any modification should be based on the premise that many suppliers would continue to use paper-based communications in procurement and that the use of EDI should not be imposed on them and should not adversely affect their ability to compete with suppliers that used EDI. It was also stressed that the procuring entity should not be compelled by the Model Law to use EDI. The Commission, in requesting the drafting group to prepare an appropriate reformulation of article 9, expressed its understanding that the reference to a record was understood to be a reference to a durable record.

65. Subject to the above modifications, the Commission adopted paragraph (1).

Form of submission of tenders (article 25 (5))

66. Having agreed on the approach to be taken in paragraph (1) with a view to enabling the use of EDI, the Commission considered the related question of form requirements for submission of tenders, a question addressed in article 25 (5). It was generally agreed that that question warranted a special provision in the

Model Law because the submission of tenders had to be subject to special security measures, in particular measures ensuring that, before the simultaneous opening of tenders, neither the procuring entity nor the other suppliers or contractors would be able to discover the content of the tender. The Commission considered a proposal to reformulate article 25 (5) to the effect that a tender could be submitted either in writing and in a sealed envelope, or by any other means that provided a secure, confidential method of communication. The Commission agreed with the proposal on the understanding that neither the procuring entity nor suppliers or contractors would be compelled to use EDI.

67. Further suggestions were aimed at refining the text. One suggestion was to provide that the acceptability of submission of tenders in an EDI form should be stipulated by the procuring entity. The purpose of the suggestion was to clarify that the procuring entity could not be compelled to accept tenders in an EDI form. Another suggestion was to specify that, in addition to security and confidentiality, the EDI method used had to provide satisfactory assurance as to the authenticity of the tender. It was observed that, in devising a provision on authenticity of tenders, it should be borne in mind that the means and reliability of authentication depended on the method for transmitting the message. For example, the telefax technique provided a low level of assurance as to the authenticity of the message. Thus, it was suggested not to leave in doubt whether telefax was considered to be an EDI communication covered by article 25 (5). A further suggested formulation was that tenders in EDI must meet a degree of security, confidentiality and authenticity that was comparable to the degree of security, confidentiality and authenticity offered by a written tender in a single sealed envelope. Yet another suggestion was to clarify that the EDI transmission method used had to provide a durable record of the transmitted tender.

68. The Commission, noting that the provision should be neutral as regards particular forms of technology, accepted these suggestions in principle and referred them to the drafting group.

Paragraph (2)

69. The Commission decided not to accept a proposal to remove the communication provided for under article 32 (1) from the scope of paragraph (2). The Commission also noted that the reference to article 11 (3) was mistaken and should be replaced by a reference to article 18 (3). Subject to the above correction, the Commission adopted paragraph (2).

Paragraph (3)

70. The Commission adopted paragraph (3) unchanged.

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

71. A question was raised as to which sources of law were meant to be referred to by the expression "the laws of this State", in particular whether it was clear that it meant to refer not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In this regard it was noted that, in addition to the national laws concerning legalization, obligations arising from treaties applied to the legalization of documents and that this needed to be adequately reflected in article 10. It was further noted that there might be differences from State to State as to which of those various sources of law would be considered covered by the expression "laws of this State", especially since in some States treaties were considered

automatically part of the national law, while in other States the enactment of implementing legislation was required in order to give effect to treaty obligations. The view was expressed that for the purposes of clarity it would be preferable to include a more specific reference, including mention of laws, treaty obligations, regulations, and perhaps even requirements imposed as a result of practice. The prevailing view, however, was that, for the purposes of a model law, the existing reference simply to "laws" was sufficient. At the same time, it was agreed that it might be usefully explained in the Guide to Enactment that in some States a general reference to laws would suffice, while in other States a more detailed reference to various sources of law would be warranted. Only limited support, however, was expressed for referring in the Model Law or in the Guide to legalization requirements imposed as a result of practice since this was felt to run counter to the objective of transparency.

72. The Commission noted that the situation of unequal treatment of different foreign suppliers and contractors might arise in instances where the State was a party to a treaty regulating the legalization of documents with the countries of origin of some but not of all foreign suppliers or contractors and was therefore obliged to apply less strenuous procedures only to some suppliers or contractors. It was agreed that the regulation of such a case was beyond the purview of the Model Law, though it would be useful to bring the possible situation to the attention of enacting States in the Guide to Enactment.

73. After deliberation, the Commission adopted article 10 unchanged.

Article 11. Record of procurement proceedings

Paragraph (1)

74. A number of refinements were agreed upon with respect to the formulation of paragraph (1). The Commission agreed that the wording should reflect the possibility, as evident in some States, that the record of the procurement proceedings would be prepared not by the procuring entity but by another government agency, though the procuring entity would maintain a copy of the record so as to make it available to suppliers or contractors. For that reason, the Commission decided to replace "prepare" by the word "keep" or "maintain".

75. The Commission also decided to insert words along the lines of "at least" before the words "the following information", so as to make it clear that the information referred to in paragraph (1) would be regarded as the minimum content of the record. In this regard, it was noted that the use of such additional language in the Model Law should not encourage the imposition of additional requirements not in the spirit of the Model Law. The Commission further agreed to replace the reference in subparagraph (k) to the "grounds" upon which the procuring entity could exclude contractors or suppliers on the basis of nationality by a reference to the "grounds and circumstances" in order to align the text with similar expressions used elsewhere in the Model Law. Lastly, the Commission agreed to insert a new subparagraph ("(l)"), adding to the required content of the record a summary of requests for clarifications submitted by contractors or suppliers with respect to prequalification and solicitation documents and the corresponding clarifications given by the procuring entity. It was noted that this amendment would require a consequential amendment of paragraph (3).

Paragraphs (2) and (3)

76. The Commission decided to replace the words "made available for inspection by" in paragraphs (2) and (3) by the words "made available to". It was felt

that the revised formulation would better convey the intended flexibility as regards the particular mode in which the record might be made available. The Commission also agreed that paragraph (3) should explicitly state that the record would be made available to contractors or suppliers only upon request.

77. The Commission adopted a proposal to reformulate the second sentence of paragraph (3) so that it would refer only to early disclosure upon the order of a competent court of the portion of the record referred to in subparagraphs (c) to (e), and not the portion of the record referred to in subparagraphs (f) and (g). This change was necessitated by the fact that the circumstances referred to in subparagraphs (f) and (g) could not arise prior to acceptance of the tender, proposal or offer and a court therefore could not order disclosure of that information at an earlier point.

78. The Commission agreed that, in order to distinguish information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and their prices, referred to in paragraph (3) (b), from the summary of such information, referred to in paragraph (1) (e), wording along the following lines should be added to paragraph (3) (b): "... and tender, proposal, offer or quotation prices, beyond the summary referred to in paragraph (1) (e)".

79. Subject to the above modification, the Commission adopted paragraphs (2) and (3).

Paragraph (4)

80. The view was expressed that paragraph (4) should be deleted on the ground that the procuring entity should be subject to unfettered liability for failure to maintain a record, since this obligation was one of the pillars of transparency in the system established in the Model Law. In response, it was explained that the rationale behind paragraph (4) was to strike a balance between the need to enforce the record requirement and the need not to impose excessive burdens on the procuring entity, in particular in the event of what might be innocent errors or omissions. The Commission affirmed the decision of the Working Group that the present text struck a proper balance between those considerations and that a reference to exclusion of liability in damages was necessary to make it clear that injunctive and similar forms of relief were not excluded. It was agreed, however, that the word "monetary" before "damages" was superfluous and should be deleted. The Commission also accepted a proposal that paragraph (4) should be reformulated to read: "... damages due to failure to maintain a record ...".

Article 12. Inducements from suppliers and contractors

81. The Commission agreed on a number of modifications designed to make clearer the intended scope and effect of article 12. First, it was decided to insert the words "directly or indirectly" before the words in the first sentence, "offers, gives or agrees to give", so as to make it abundantly clear that the provision covered also inducements offered through an agent. This clarification was said to be particularly useful because the provision covered illicit actions, which had to be described in a manner that left as little as possible to interpretation; at the same time, it was stressed that the absence of words such as "directly or indirectly" in other provisions should not be interpreted as meaning that actions through an agent were meant not to be covered in such other provisions.

82. Secondly, it was decided to replace the words "gratuity, whether or not in the form of money" by the words "gratuity in any form".

83. Thirdly, the Commission decided to add after the words "officer or employee of the procuring entity" the words "or other governmental authority" in order to cover also an inducement to a person who, while not being an officer or an employee of the procuring entity, was in a high government position and thereby able to influence the procurement process. It was also decided to add "or other governmental authority" after the words "act or decision of, or procedure followed by, the procuring entity". Lastly, it was agreed to replace the words "the rejection" at the beginning of the second sentence by the words "such rejection".

84. In response to a suggestion that specific mention needed to be made of acts of omission, the Commission took the view that the existing wording, "an act or decision of, or procedure followed by, the procuring entity", was sufficient to cover acts of commission and acts of omission.

85. Subject to the foregoing modifications and clarifications, article 12 was adopted. A suggestion to refer in the text to proof of the allegation of inducement was referred to the discussion of the review procedures, and to the Guide, to the extent any additional clarification might be required.

Article 13. Methods of procurement

86. The Commission affirmed the principle enunciated in paragraph (1) that tendering should be the normally used method of procurement. It also was generally agreed that the balance of discretion offered to and constraints placed on the procuring entity with respect to the choice of a method of procurement other than tendering was appropriate. After deliberation, the Commission adopted the article unchanged.

Article 14. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

Paragraph (1)

87. In order to refine the wording of the chapeau of subparagraph (a), it was agreed to replace the words "the procuring entity is unable to formulate" by words along the lines of "it is not feasible for the procuring entity to formulate". This change was intended to reflect that, while objective circumstances were important, some exercise of discretion by the procuring entity was involved in the decision whether the conditions existed for justifying the use of one of the three methods of procurement referred to in article 14. It was noted that the exercise of this discretion was subject to the approval and record requirements of the Model Law.

88. The Commission decided in favour of retaining the present wording of subparagraph (a) (ii), rather than to accept wording along the lines of "because of the nature of the goods or construction, specifications cannot be established with sufficient precision to permit the award of the contract by selecting the successful tender according to the procedures set forth in chapter III". It was felt that the existing language had an appropriate focus on the technological circumstances intended to be referred to.

89. The Commission affirmed the inclusion in subparagraph (c) of a specific authorization for the use of the methods of procurement referred to in article 14 in cases in which the Model Law was applied to procurement involving national defence or national security pursuant to article 1 (3). It was noted that subparagraph (c) was not thereby repetitive of article 1 (3). It merely served to make it clear that, when the Model Law ever applied to defence procurement, the procuring entity was permitted to use one of the methods of procurement other than tendering. The Commission decided on the same grounds to retain article (f) concerning the use of single-source procurement in such cases.

90. The Commission considered a proposal to insert in subparagraph (d) the following wording: "when, in the judgement of the procuring entity, engaging in new tendering proceedings ..." A concern was expressed that the new wording would inject an undesirable degree of subjectivity. However, it was widely felt that the change usefully made it clear that the question of whether to retry a failed tendering proceeding was a matter left to the discretion of the procuring entity, and thereby would avoid needless disputes. It was also pointed out that the subparagraph dealt with a discretionary matter that was ultimately subject to approval and beyond the purview of the right to review envisaged in article 38.

91. Subject to the above modifications, the Commission adopted paragraph (1).

Paragraph (2)

92. The Commission affirmed the two-track approach contained in paragraph (2), permitting use of competitive negotiation in two types of cases of urgency: the case of urgent circumstances that were not foreseeable or a result of dilatory conduct on the part of the procuring entity and the case of urgency caused by a catastrophic event. In response to a question as to the need to distinguish between the two cases, the Commission noted that the case concerned in subparagraph (a) was subject to the exception of foreseeability and dilatory conduct so as to limit the extent to which the grounds of urgency would be used to avoid abusive circumstances of tendering proceedings. It was affirmed that such limitations should not apply when the urgent circumstances involved humanitarian needs, a position reflected in subparagraph (b).

93. It was then pointed out that the resort to competitive negotiation on the urgency grounds referred to in paragraph (2) was not subject to the approval requirement contained in the chapeau of paragraph (1). The Commission noted that this was the result of an apparent oversight and affirmed that the approval requirement should indeed apply to the choice of competitive negotiation on the grounds of urgency, in particular as the approval requirement was applied to the choice of single-source procurement on similar urgency grounds.

94. As regards the precise formulation of the urgency grounds in paragraph (2) (a) and (b) and, for that matter, also in article 16 (b) and (c), it was agreed to replace the expression "impossible or imprudent" by the word "impractical". It was agreed to replace, in subparagraph (b) of the present paragraph (2), the words "amount of time" by the word "time". A suggestion that the term "direct competitive negotiation" be used, as opposed to "competitive negotiation", was considered unnecessary since article 14 dealt only with the choice of a procurement method other than tendering, and not the procedures used in those methods, an area dealt with in chapter IV.

95. Subject to the above modifications, the Commission adopted paragraph (2).

Article 15. Conditions for use of request for quotations

Paragraph (1)

96. In response to a proposal to define "quotations", it was noted that the Working Group had decided not to include in article 2 definitions of the methods of procurement other than tendering. However, this would not preclude including in article 36 a more detailed explanation of what was involved in a "quotation".

Paragraph (2)

97. The suggestion was made to make the provision in paragraph (2) a general rule applicable to other non-tendering methods of procurement so as to prohibit the artificial division of procurement of packages of goods and works by procuring entities simply for the purpose of avoiding tendering. In this regard, it was noted that applying the rule contained in paragraph (2) to all methods of procurement other than tendering was not appropriate because request for quotations was, in the context of the Model Law, the only method of procurement the use of which was linked to the value of the procurement contract. The Commission agreed thereto and noted that the attention of enacting States should be drawn in the Guide to Enactment to the principle that procuring entities should abstain from artificially dividing procurement packages in order to avoid tendering.

Article 16. Conditions for use of single-source procurement

Subparagraph (a)

98. The Commission adopted subparagraph (a) unchanged.

Subparagraphs (b) and (c)

99. No changes of substance were made to subparagraphs (b) and (c). However, in line with the modification made earlier in article 14 (2) (a) and (b), the words "impossible or imprudent" found in subparagraphs (b) and (c) were replaced by the word "impractical". In subparagraph (c), the words "amount of time" were replaced by the word "time".

Subparagraph (d)

100. A suggestion was made to refer to the notion of "cost effectiveness" rather than to the "reasonableness" of the price of the follow-on purchase. Such a change was felt to be unnecessary, however, since the text of subparagraph (d) already referred to factors that represented key elements of cost effectiveness. The Commission adopted subparagraph (d) unchanged.

Subparagraphs (e) and (f)

101. The Commission adopted subparagraphs (e) and (f), subject to the correction in the latter subparagraph of the reference to article 1 (2) to read "article 1 (3)".

Subparagraph (g)

102. The Commission noted that subparagraph (g) contained a reference to an approval requirement and that, unlike other references to an approval requirement, including the reference in the chapeau of paragraph (1) concerning recourse to single-source procurement, the reference to approval in

subparagraph (g) was not presented as an option to enacting States. It was agreed that, in principle, this should remain so since the Model Law should recognize that the decision to use single-source procurement in the economic emergency type of circumstance referred to would ordinarily be taken at the highest levels of government, or at least it was a decision that should be taken at such a high level.

103. Several suggestions were considered aimed at making the substance and exceptional nature of subparagraph (g) stand out better. One such suggestion that was accepted was to relocate the provision to a new paragraph (2), as this would highlight the exceptional nature of the procedure envisaged. Another suggestion was that, in order to deal with the impression of "double approval" created by the presence of an approval requirement both in the chapeau of paragraph (1) and in subparagraph (g), the Guide to Enactment should explain that those enacting States that incorporated the approval requirement in paragraph (1) might not necessarily have to incorporate the approval requirement in subparagraph (g). It was further agreed that the word "approval" should be replaced by the words "approval by ... (the enacting State designates an organ to issue the approval) ...". Questions were raised as to whether the references in the existing text to procedures to be followed prior to the use of single-source procurement on the basis of subparagraph (g) might be too vague. It was widely felt, however, that additional precision concerning the modality of implementation of the procedures was not necessary in a framework Model Law. Yet another suggestion was to use the term "governmental authorization" in place of "approval".

104. Subject to the above modifications, the Commission adopted subparagraph (g).

CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 17. Domestic tendering

105. It was suggested that the reference in subparagraph (b) to "low amount or value" was not sufficiently clear and might be improved by referring instead to the "small quantity or low monetary value". The Commission referred that suggestion to the drafting group.

106. The Commission noted that the reference in the latter portion of the article to article 11 (2) was mistaken and should be replaced by a reference to article 18 (2).

107. Subject to the above drafting suggestion and modification, the Commission adopted article 17.

Article 18. Procedures for soliciting tenders or applications to prequalify

Paragraph (1)

108. The Commission adopted paragraph (1) unchanged.

Paragraph (2)

109. A view was expressed that the requirement of international publication in a language used in international trade, set out in paragraph (2), was too onerous on the procuring entity to be imposed as a general rule, particularly in the case of low-value procurements. It was argued that any foreign suppliers or contractors interested in participating in procurement in a certain country already had the means of discovering the procurement needs of that country, including through the use of diplomatic or consular trade representatives. It was stated that publication in a major national journal should therefore suffice.

110. A countervailing view was that publicity was one of the most important aspects in procurement because it promoted competition resulting in better quality and lower prices for the procuring entity. Furthermore, the only way in which the Model Law could promote international trade, as referred to in subparagraph (b) of the preamble, was through international procurement, in which international publicity was the key element. It was stated that many companies, particularly small ones, would be disadvantaged without the international publicity requirement in paragraph (2). It was further stated that the costs involved in advertising would not be a deterrent as they were recoverable or could be minimized if a journal such as Development Business, a publication of the United Nations Department of Public Information, were used to publish invitations to tender and invitations to prequalify. It was also pointed out that article 17 (b) already excluded low-value domestic procurements from the application of article 18 (2).

111. After deliberation, the Commission agreed to leave paragraph (2) unchanged. It was noted that the text before the Commission was a Model Law, and that therefore any State that found it difficult to enact paragraph (2) could choose not to do so. It was also agreed that the Guide to Enactment could usefully stress the possibility of fulfilling the publication requirement through the use of Development Business.

Paragraph (3)

112. A proposal was made to relocate paragraph (3) to chapter II. In support of the proposal it was stated that restricted tendering, particularly in certain regions, represented the most common exception to open tendering. It was suggested that the present formulation and location of paragraph (3) failed to provide adequate treatment to this important exception to open tendering, which, because it lacked one of the most important ingredients of tendering, namely publicity, was particularly open to abuse.

113. Opposition was expressed to the proposal on the basis that restricted tendering was not a method of procurement distinct from tendering, the only difference being that it lacked open solicitation. It was suggested that a middle-ground solution could be to make paragraph (3) a separate article within chapter III. After deliberation, the Commission decided to relocate the paragraph to chapter II.

114. As to the formulation of paragraph (3) regarding the conditions for use of restricted tendering, the view was widely expressed that the present formulation of the grounds as "economy and efficiency" was too vague and subject to abuse. It was suggested that these words should be replaced by the words "in particular and exceptional circumstances". Another proposal was that the two phrases could be combined and that the decision to use restricted tendering should be made subject to approval; yet, the solution that attracted the strongest support was the listing in the provision of the conditions for use of restricted tendering.

It was thus agreed that the grounds for the use of restricted tendering should be spelled out and that the procedures for use of restricted tendering should remain those for tendering proceedings, except for the requirement of open solicitation.

115. The Commission then considered the specific manner in which its decision would be formulated in the text of the Model Law. As to the conditions for use of restricted tendering, one proposed formulation listed conditions including: the limited number of suppliers or contractors from whom the goods are available; urgency; failure of a public tendering proceeding; procurement of small quantities; and a reference to "any other exceptional cases".

116. It was generally agreed that the first case, that of a limited number of suppliers or contractors being able to supply the goods or construction, should be included. As to the other cases, however, it was widely felt that such an extensive enumeration would lead to the use of restricted tendering in inappropriate circumstances. Furthermore, the suggested enumeration was not felt to provide an appreciable degree of added precision beyond that in the existing text in article 18 (3), which referred to grounds of economy and efficiency. Questions were raised as to why it should be assumed that, in the case of a failed tendering proceeding, use of restricted tendering would be any more successful in finding a qualified supplier or contractor. Similarly, doubts were cast on the significance of the amount of time that would actually be saved in cases of urgency by the use of restricted tendering, in particular since the Model Law provided other, more expeditious methods of procurement for cases of urgency. There was agreement that restricted tendering should be available in cases of low-value procurement, but subject to considerations of economy and efficiency and formulated along the lines of the explanation contained in the draft Guide: "where the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured".

117. As regards the procedures to be followed in restricted tendering, which would be described in chapter IV, it was agreed that no reference was needed to the supplier invited being reputable, since article 6 had been modified to make it clear that a qualification requirement applied to all methods of procurement. Concerning the selection of the suppliers, a two-fold approach was agreed on designed to curb distorted application of restricted tendering. One leg of this approach was to require that, for resort to restricted tendering in cases of limited numbers of suppliers or contractors, all the suppliers or contractors that could supply the goods or construction should be invited. In the case of low-value contracts, the provision would require the participation of suppliers or contractors in numbers sufficient to ensure an adequate level of competition."

118. Subject to the above relocation and modifications, the Commission adopted paragraph (3).

Article 19. Contents of invitation to tender and invitation to prequalify

Paragraph (1)

119. It was agreed that paragraph (1) (b) and (c) should be expanded to provide that the place of delivery of the goods should be indicated in the invitation to tender. Subject to that modification, the Commission adopted paragraph (1). It was noted that the reference in subparagraph (d) to article 8 (1) (a) was mistaken and should be replaced by a reference to article 6 (2).

Paragraph (2)

120. It was noted that article 7 (3) required the prequalification documents to disclose the place and deadline for submission of tenders, while this information was not required in the draft Model Law for the invitation to prequalify in view of the possibility that such information might not be available to the procuring entity at the time it would draw up the invitation to tender. Upon deliberations concerning article 7 (3), the Commission had already agreed that the preferable approach would be to require mention of the place and deadline for submission of tenders in the invitation to prequalify as well as in the prequalification documents, if the information was known to the procuring entity at the time (see para. 50).

121. A proposal to restructure the chapeau of paragraph (2) so as to make it clearer was referred to the drafting group. Subject to the above modification and clarification, the Commission adopted paragraph (2).

Article 20. Provision of solicitation documents

122. The Commission agreed to a proposal to expand the rule in article 20 to also cover charges for prequalification documents. It was noted that a modification to the title of the article to reflect this expansion would be necessary, along the following lines: "Provision of solicitation documents; price of prequalification documents and solicitation documents".

123. A question was raised whether the cost of the documents referred to in article 20 consisted of the cost of producing and distributing the documents, or merely the cost of printing, in which case it might be better to clearly state so. It was pointed out that the Guide to Enactment made it clear that the cost referred to in article 20 was the cost of printing and providing the documents.

Article 21. Contents of solicitation documents

Chapeau

124. The Commission noted that different variations of expressions such as the term "at a minimum", used in the first sentence of article 21 in order to make clear that the procuring entity could include in the solicitation documents additional information, appeared at various points in the draft Model Law. The Commission requested the drafting group to ensure their consistency.

Subparagraphs (a) to (e)

125. The Commission adopted subparagraphs (a) to (e) unchanged.

Subparagraph (f)

126. The Commission decided not to accept a proposal that subparagraph (f) should refer merely to the principal terms and conditions of the procurement contract, although there was some sentiment that the proposed reformulation would be more practical.

Subparagraph (g)

127. The Commission adopted subparagraph (g) with the following addition at the end: "and a description of the manner in which alternative tenders are to be evaluated and compared". The Commission intended to make it clear that, in the

case in which the procuring entity solicits alternative tenders, the solicitation documents should decide the manner in which the alternative tenders would be considered, in particular whether a supplier or contractor submitting an alternative tender would have to submit a tender in conformity with the specifications in order for the alternative tender to be considered.

Subparagraphs (h) to (r)

128. The Commission adopted subparagraphs (h) to (r) unchanged, subject to the inclusion of a new subparagraph ("l bis") concerning the need to mention in the solicitation documents the exceptional case of forfeiture of the tender security for withdrawal or modification of the tender prior to the deadline for submission of tenders, and subject to the replacement in subparagraph (n) of the words "the procuring entity intends to convene" by the words "the procuring entity intends, at this stage, to convene".

Subparagraph (s)

129. The Commission noted that no other portion of article 21 was subject to a liability exclusion of the type contained in subparagraph (s) and that this would remain so if, as suggested therefore, the provision were relocated after subparagraph (x) or (y). The Commission adopted subparagraph (s) unchanged.

Subparagraphs (t) to (y)

130. The Commission adopted subparagraphs (t) to (y) unchanged.

Article 22. Rules concerning description of goods of construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

131. The Commission accepted a proposal to move article 22 to chapter I. The aim of the relocation was to apply to all methods of procurement the principle of objectivity in the description of the goods or construction so as to foster competition, to limit abusive resort to single-source procurement, and to facilitate the choice of the most competitive method of procurement possible. The Commission referred to the drafting group a concern that the relocated provision should take into account that things like solicitation documents and specifications were used to varying degrees in the methods of procurement other than tendering. It was suggested that the problem might be cured by making references to the solicitation documents and to specifications subject to a proviso along the lines of "to the extent and where appropriate". The Commission accepted a proposal to replace the words in paragraph 3 (b) "Standardized trade term shall be used" by the words "Due regard shall be had for the use of standardized trade terms". Subject to the above relocation and clarifications, the Commission adopted article 22.

Article 23. Clarifications and modifications of solicitation documents

132. The view was expressed that the procuring entity should be given a chance to correct errors in contract documents as well as in technical aspects of the solicitation documents. It was pointed out that, pursuant to article 21 (f), the contract terms and conditions were to be included in the solicitation documents, to the extent they were already known to the procuring entity, and were therefore to that extent subject to the clarification and modification

procedure foreseen in article 23. It was also suggested that recourse could be had to review in the event that the procuring entity was in breach of a duty relating to a description of the contract in the solicitation documents.

133. The Commission adopted article 23 unchanged.

SECTION II. SUBMISSION OF TENDERS

Article 24. Language of tenders

134. The Commission adopted article 24 unchanged.

Article 25. Submission of tenders

Paragraph (1)

135. The Commission decided to add to the provision the obligation of the procuring entity to fix the place where tenders were to be submitted. Subject to that addition, the paragraph was adopted.

Paragraph (2)

136. The question was raised whether it would be useful to include in the paragraph guidance as to the length of the extension of the deadline. The Commission considered that such guidance was not called for in view of the fact that the Model Law left the length of the period for the submission of tenders to be decided by the procuring entity to reflect the particular circumstances at play and in accordance with any procurement regulations on the matter. In response to a question, it was clarified that "a meeting of suppliers and contractors", referred to in the paragraph, was a meeting convened by the procuring entity under article 23 (3).

137. The Commission adopted paragraph (2) unchanged, subject to a request to the drafting group to review the use of the expression "supplier and contractor" in paragraph (2).

Paragraph (3)

138. A concern was expressed that the existing formulation allowed an excessive degree of discretion to the procuring entity, in particular since it referred to "any" circumstance beyond the control of a supplier or contractor. The Commission decided, however, to retain the existing discretionary approach. In this connection, it was noted that the absence of a qualification of the word "may" might in some national laws lead to the interpretation that a decision not to extend the deadline was open to judicial review, while under the national laws of other countries the current wording would not give rise to such an interpretation. In order to avoid any misinterpretation of the intended effect of the provision, it was decided to add to the words "the procuring entity may" an expression such as "in its absolute discretion". The Commission adopted the paragraph, subject to that clarification, and agreed that the question raised should be mentioned in the Guide.

Paragraph (4)

139. The Commission adopted paragraph (4) unchanged.

Paragraph (5)

140. It was noted that, in connection with its consideration of article 9, the Commission had agreed to modify article 25 (5) so as to enable the use of EDI for the submission of tenders (paras. 66-68).

141. The Commission, noting that the provision enabling submission of tenders by EDI would require such tenders to be authenticated, agreed that paragraph (5) should encompass a signature requirement.

142. A suggestion was made for the paragraph to require a signature by a director or officer of the company submitting the tender. The suggestion was not adopted on the ground that such specific requirement may touch upon, and interfere in an undesirable way with, rules of company law and other rules dealing with the question of validity and binding nature of the tender.

143. Subject to the agreed upon modification, the Commission adopted paragraph (5).

Paragraph (6)

144. The Commission adopted paragraph (6) unchanged.

Article 26. Period of effectiveness of tenders; modification and withdrawal of tenders

Paragraph (1)

145. The view was expressed that the words "in effect" contained in the first sentence of paragraph (1) were ambiguous, and should be replaced by clearer language along the lines of "open for acceptance". Some sympathy was expressed for the proposal to achieve greater precision in the text, but it was noted that a tender would be generally regarded as an offer and that stating that a tender was "in effect" would have a generally understood legal meaning. Hesitation over the proposed modification was expressed also on the ground that it would necessitate reformulation of the various references throughout the draft Model Law to the "effectiveness" of tenders to refer instead to tenders being "open for acceptance", an effort that might complicate the text. Bearing in mind those possible difficulties with the proposed modification, the Commission referred the matter to the drafting group.

146. The Commission agreed to the deletion of the second sentence of paragraph (1). It was generally felt that the sentence was no longer appropriate, in particular in view of the Commission's decision with respect to paragraph (3) of the present article, namely, that the draft Model Law should enable the procuring entity to stipulate in the solicitation documents that withdrawal or modification of the tender after submission of tenders would be subject to forfeiture of the tender security. Subject to deletion of the second sentence, the Commission adopted paragraph (1).

Paragraph (2)

147. The Commission adopted paragraph (2) subject to the deletion of the words "if it is not possible to do so", contained in paragraph (2) (b). This deletion was agreed upon since the provision was not intended to preclude a supplier or contractor wishing to extend the validity period of its tender security from obtaining a new tender security, even though a mere extension of the original tender security might have been possible.

Paragraph (3)

148. A concern was expressed that in some States the rule in paragraph (3) that only modification or withdrawal of a tender after the deadline for the submission of tender would be subject to forfeiture of the tender security would be contrary to existing law and practice of imposing such a forfeiture penalty even on tender modifications and withdrawals made prior to the deadline for submission of tenders. It was reported that that approach was based on the notion that the mere submission of a tender represented the formation of a "contract" or of a "preliminary contract".

149. One suggestion to meet that concern was to simply delete paragraph (3). That suggestion, however, failed to attract much support, in particular since the Commission took the view that the Model Law should recognize that, as a general rule, permitting modifications and withdrawals of tenders prior to the deadline for submission of tenders was acceptable. It was pointed out that restricting such modifications or withdrawals would discourage participation by suppliers and contractors in tendering proceedings and would be counter to widely accepted practice under most national procurement laws. At the same time the Commission agreed that the Model Law should permit procuring entities to depart from the general rule and to impose a penalty of forfeiture of the tender security for modifications and withdrawals prior to the deadline for the submission of tenders, but only if so stipulated in the solicitation documents. To this end, it was agreed to add at the beginning of paragraph (3) the words "Unless otherwise stipulated in the solicitation documents". Subject to that change, the Commission adopted paragraph (3). It also generally requested the drafting group to review and align other relevant provisions in the Model Law, in particular articles 21 and 27 (1) (f) (i), in view of the modification that had been made to paragraph (3) of the present article.

Article 27. Tender securities

150. The Commission noted that its decision to permit variation in the solicitation documents of the general rule in article 26 (3) concerning modification and withdrawal of tenders required the consequential modification of paragraphs (1) (f) (i) and (2) (d) of the present article. The matter was left to the drafting group.

151. It was noted that additional clarity might be achieved by replacing the references in article 27 to an "institution or entity" issuing or confirming a tender security by the expression "institution or person" so as to indicate that the guarantor or confirmer may also be a physical person and to avoid using the term "entity" for both the guarantor and the party procuring goods. It was further noted that additional simplicity, as well as consistency with terminology currently employed in the draft Convention on Guarantees and Standby Letters of Credit being formulated by the Commission, might be achieved by referring, depending upon the context, to "issuer" or "confirmer". The Commission requested the drafting group to consider the implementation of these suggestions. A proposal to refer to "financial" institutions was not accepted since that expression was felt to be too narrow.

152. A suggestion was made to refer expressly in the Model Law to the possibility of providing a security such as a mortgage, pledge or floating charge. The suggestion was not adopted since it was felt that, while such types of securities were not excluded by article 2 (g), it would not be desirable to refer expressly to them. Mention was made of practical difficulties in enforcing such securities that rendered them inadvisable in tendering proceedings.

153. Subject to the agreed modifications and drafting suggestions, the Commission adopted paragraph (1).

Paragraph (2)

154. It was suggested to replace, in the introductory phrase of paragraph (2), the expression "without delay" by the expression "promptly" or "without undue delay". The Commission agreed with the suggestion and gave preference to the expression "promptly", as that expression was felt to indicate more clearly the urgency of the obligation to return the tender security document.

155. It was suggested to refer in paragraph (2) (a) to the expiry of the validity period of the tender security instead of to the expiry of the tender security.

156. A suggestion was made to make it clear in subparagraph (b) that any requirement of a performance security in connection with the procurement contract should be disclosed in the solicitation documents.

157. The Commission noted that it would be necessary to align subparagraph (d) with the modification that had been agreed to with respect to article 26 (3). It was agreed that the words in subparagraph (d) "in connection with which the tender security was supplied" were superfluous and could be deleted. A suggestion was also made that a reference to "modification" could be added to the reference to "withdrawal", in line with article 23 (3).

158. Subject to the agreed modification of the introductory phrase in paragraph (2), to the alignment with article 26 (3) and to consideration by the drafting group of the amendments referred to above, the Commission adopted paragraph (2).

Article 28. Opening of tenders

Paragraph (1)

159. A concern was raised that the requirement in article 28 (1) that the time for the opening of tenders should be simultaneous with the deadline for the submission of tenders was too onerous and that it would be fair to allow some lapse of time between these two events. In response to this concern, it was noted that allowing for a lapse of time in this instance would increase opportunities for corruption and, at the least, create the appearance of impropriety. After deliberation, the Commission adopted paragraph (1) unchanged.

Paragraph (2)

160. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

161. A question was posed as to why it was necessary to announce only the price of the tender during the opening of the tenders, since this might place undue emphasis on the price as the main factor for evaluating the successful tender which was not always the case. The prevailing view was however that what was typically most important at this stage in a tendering proceeding was to establish a record of the prices of the tenders by reading them out at the opening so as to foster transparency and to avoid disputes.

162. The Commission noted that there was an inconsistency between article 28 (3), which required disclosure of the prices of the tenders at the opening of the tenders, and the provisions of article 11 (3), which stated that the prices of the tenders should only be disclosed after a tender had been accepted. It was agreed that an amendment to article 11 would be necessary to remove this inconsistency.

163. Subject to the above decision, the Commission adopted paragraph (3) unchanged.

Article 29. Examination, evaluation and comparison of tenders

Paragraph (1)

164. It was proposed to replace in paragraph (1) (b) the expression "shall correct purely arithmetical errors" by the expression "may correct purely arithmetical errors" or "shall correct arithmetical errors that it [may] [might] discover on the face of a tender". It was said that the current wording placed too strong an onus on the procuring entity in that it might become a matter of subsequent dispute whether an error was or was not apparent on the face of a tender and whether a procuring entity would be liable, for example, to a supplier or contractor whose tender would have been the lowest had the procuring entity detected the error. In support of the existing text, and in particular opposition to the expression "may correct purely arithmetical errors", several varying views were expressed: that the proposed wording allowed too much discretion to the procuring entity as to the examination of tenders and as to correcting arithmetical errors; that the procuring entity was expected to check tenders with appropriate care and that the proposed words did not sufficiently reflect that expectation; that the checking of tenders was necessary in order to avoid rejecting a tender that could have been adopted had the procuring entity discovered the arithmetical error. Particular emphasis was placed on the view that the existing language represented an unfair distribution of the risk that suppliers and contractors might not prepare their tenders carefully. It was questioned whether the Model Law should place procuring entities in a position of possible liability for failing to notice an error in a tender when in fact the error was due to the carelessness of the supplier or contractor.

165. After discussion, the Commission adopted the view that, in order to accommodate the concern raised, the provision should use wording to refer to arithmetical errors along the lines of "that are apparent on the face of a tender and that are discovered during tender evaluation" or "that are discovered on the face of the tender". It was felt that the revised wording would avoid placing an undue responsibility on the procuring entity for discovering arithmetical errors, while ensuring that, when an arithmetical error was discovered, there would be a procedure to correct it. The Commission did not adopt the suggestion to replace in the proposed wording the words "are discovered" by wording such as "may discover", "might discover" or "reasonably might have discovered" since such wording might be understood as establishing a standard of care to be observed by the procuring entity, something that was not the purpose of the provision.

166. The Commission adopted the proposal to replace in paragraph (1) (b) the words "shall give notice" by "shall give prompt notice".

167. Subject to those modifications, the Commission adopted paragraph (1).

Paragraph (2)

168. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

169. It was suggested to delete paragraph (3) (b), which could make it possible for a tenderer to avoid the conclusion of the contract by refusing to accept a correction of an arithmetical error. It was said that there were cases in which contractors or suppliers purposely included arithmetical errors in tenders so as to retain a possibility of refusing to accept a correction and to then have the tender rejected in accordance with that paragraph (3), or so to be able to insist on the erroneous price in the event that would be advantageous. However, in support of the retention of paragraph (3) (b), it was said that the risk of a supplier or contractor acting in bad faith was outweighed by the problems that might arise when, as the result of the absence of a clear rule in the Model Law, the parties would be in disagreement as to whether there existed an arithmetical error and how it should be dealt with.

170. The proposal to add in paragraph (3) (b) the words "or its representative who submitted the tender" after the words "supplier or contractor" was not adopted on the ground that throughout the Model Law it could generally be assumed that a supplier or contractor might act through a representative.

171. After deliberation, the Commission adopted paragraph (3) unchanged.

Paragraph (4)

172. A suggestion was made to amend paragraph (4) (b) (i) to read along the following lines: "The successful tender shall be (i) the tender from the tenderer which has been determined to be fully capable of undertaking the contract and whose tender bears the lowest tender price." The purpose of the amendment was to allow the procuring entity to take into account, in addition to the price, also the capability of the tenderers to perform the contract. The proposed modification did not attract much support. It was agreed that, once a supplier or contractor was found to be qualified and its tender accepted as envisaged in article 29 (3) (a), slight differences among the suppliers or contractors as to their capability to perform the contract should not be used as a factor in evaluating the tenders. Otherwise, an undesirable degree of subjectivity would be injected into the evaluation of tenders that would open the door to improper practices. To guard against this risk in tendering proceedings, the qualification decision should be simply an "in or out" decision, and not a criterion for comparing tenders.

173. As to paragraph (4) (c) (iii), which the Commission decided by consensus to retain in its present form, a view was expressed that its deletion would have been preferable since, as a matter of principle, after establishing that the tenderer was qualified and that the quality of the goods met the specifications, the price should be sole the criterion for evaluating tenders. It was also stated that paragraph (4) (c) (iii), by introducing factors extraneous to the goods or construction being procured, ran counter to the thrust of the Model Law. Furthermore, for the same reasons that prompted the Commission to make single-source procurement (article 16 (g)) subject to approval, it would have been advisable to make also the use of such more subjective factors enumerated in paragraph (4) (c) (iii) subject to the approval of a high governmental authority in order to limit abuse.

174. The Commission agreed to provide in paragraph (4) (d) that the use of a margin of preference had to be reflected in the record of the procurement

proceedings; as a consequence, the Commission decided to include in article 11 (1) information on the use of a margin of preference as an element of the record of procurement proceedings.

175. Subject to the modification of paragraph 4 (d), the Commission adopted paragraph (4).

Paragraph (5)

176. The Commission agreed to state expressly in paragraph (5) that the exchange rate for converting tender prices was the exchange rate to be indicated in the solicitation documents in accordance with article 21 (r). It was observed that, if the solicitation documents did not set forth the currency and exchange rate as required by article 21 (r), the omission would have to be clarified in a procedure for clarification of the solicitation documents, as specified in article 23. Subject to that modification and to review of the paragraph by the drafting group, the paragraph was adopted.

Paragraphs (6), (7) and (8)

177. The Commission adopted paragraphs (6), (7) and (8) unchanged.

Article 30. Rejection of all tenders

178. The Commission adopted article 30 unchanged.

Article 31. Negotiations with suppliers and contractors

179. A concern was expressed that article 31, which precluded the procuring entity from negotiating with suppliers or contractors with regard to the tenders submitted, failed to afford the procuring entity with sufficient flexibility to deal with cases in which all the tender prices were excessively high due apparently to a price-fixing scheme among the suppliers and contractors. In order to address that concern, it was suggested to create an exception by adding at the beginning of article 31 wording along the lines of "Except in cases where the procuring entity has reasons to believe that there is a price-fixing agreement between the suppliers". In response, it was noted that article 31 was not intended to address the problem of price-fixing, but was considered to be essential to generally preserve the integrity of tendering. It was pointed out that once suppliers or contractors knew that negotiation might take place after submission of tenders, they would have little incentive to offer their best prices. Instead, suppliers and contractors would increase their tender prices measurably in anticipation of being pressured to reduce them, and procuring entities would in the end pay more than necessary. It was suggested that, from the standpoint of the long-term integrity of the procurement system, it would be preferable to deal with cases of collusion by providing for rejection of all tenders under article 30, rather than by weakening the general rule of no negotiation. In addition, the procuring entity would still have access to other possible measures such as administrative disbarment proceedings. It was further pointed out that cases of price-fixing could be dealt with also under other bodies of law, such as criminal or competition law, the application of which was not excluded by the Model Law.

180. After deliberation the Commission adopted article 31 unchanged.

Article 32. Acceptance of tender and entry into force of procurement contract

Paragraphs (1) and (2)

181. The Commission adopted paragraphs (1) and (2) unchanged.

Paragraph (3)

182. The Commission agreed to replace the words "where the procurement contract is required to be approved" by the words "where the solicitation documents stipulate that the procurement contract is subject to approval". It was felt that such a clearer statement of the role of the solicitation documents in giving notice to suppliers and contractors of formalities required for entry into force of the procurement contract would be useful. Subject to the modification, the Commission adopted paragraph (3).

Paragraphs (4) and (5)

183. The Commission adopted paragraphs (4) and (5) unchanged.

Paragraph (6)

184. A proposal was made that, in order to promote transparency in the procurement process, the notice of the award of the procurement contract currently given only to suppliers and contractors that participated in the tendering proceedings, should be extended to the general public by requiring publication of the notice of the procurement contact. It was further suggested that, in order to achieve even broader transparency, such a publication requirement should be extended to other procurement methods as well. In support of this proposal, it was stated that such notification, in addition to providing transparency, could also be useful to subcontractors who might have an interest in the procurement. A concern was expressed, however, that requiring an across-the-board publication for every award of a procurement contract would be too onerous and expensive on the procuring entity.

185. In order to meet the aims of the proposal as well as to take account of the concern that had been raised about it, the Commission decided upon a two-fold approach. The first half of the solution was to add to article 11 (1) (b) the information concerning award of procurement contracts. This would mean that the information would be included in the portion of the record of the procurement proceedings made available to the general public under article 11 (2). The second half of the solution was to add a new article ("11 bis") that would state the general rule that notices of procurement contract awards should be published; at the same time, this rule would not be applicable to awards where the contract price was below a certain value, the exact value being left to enacting States to determine. It was further agreed that, for those States that so wished, the procurement regulations could provide the manner of the publication of the notice of award.

186. Subject to the above decisions, the Commission adopted paragraph (6).

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 33. Two-stage tendering

187. The Commission adopted article 33 unchanged.

Article 34. Request for proposals

188. The Commission adopted article 34 unchanged.

Article 35. Competitive negotiation

Paragraphs (1), (2) and (3)

189. The Commission adopted paragraphs (1), (2) and (3) unchanged.

Paragraph (4)

190. The Commission agreed, in order to make clearer the role of the best-and-final-offer procedure, to add the following sentence at the end of paragraph (4): "The procuring entity shall select the successful offer on the basis of such best and final offers." Subject to that modification, the Commission adopted paragraph (4).

Article 36. Request for quotations

Paragraph (1)

191. It was proposed to require the procuring entity, in describing the components of the price quotation, to indicate those charges, duties and taxes in the supplier's country that are to be excluded. It was stated that the rationale behind this proposal was to enable the suppliers and contractors to prepare their price quotations on the basis of all the relevant information applicable to the price calculation. That proposal was not accepted, as the Commission felt that the matter was already adequately dealt with in paragraph (1). The Commission adopted paragraph (1) unchanged.

Paragraph (2)

192. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

193. A concern was raised that the decision on which supplier or contractor to award the contract was not always based on the price only and that the phrase "responsive to the needs of the procuring entity" was too vague and did not properly reflect the other considerations. It was suggested that the phrase "most beneficial to the procuring entity" would better reflect these other considerations. A countervailing view was that this would make the considerations other than price too subjective, when in fact what was meant to be referred to were basic requirements such as place and time of delivery. After deliberation the Commission agreed that words such as whether the quotation "meets the need of the procuring entity" would be adequate.

194. The Commission also considered whether the reference to the "reliability" of the supplier offering the lowest quotation should be retained, or whether reference should be made instead to the supplier having to be "qualified", as this would be consistent with the terminology used in article 6. The concern was raised that introduction of the notion of reliability would be confusing, and would raise the possibility of an undesirable degree of subjectivity and the attendant risk of corruption. In favour of retaining the existing reference to reliability, it was stated that use of this expression was meant to coincide with the simple, relatively informal nature of request-for-quotations

proceedings. On the basis of the foregoing discussion the Commission retained the existing expression (see, however, paras. 197-201).

195. The Commission adopted paragraph (3) subject to the modification it had agreed upon.

Article 37. Single-source procurement

196. A question was raised as to the necessity of retaining article 37 in view of the paucity of detail contained therein concerning the procedures to be followed. The Commission affirmed that the article should be retained, noting with approval the decision of the Working Group that the treatment in the Model Law of the procedures to be followed in the methods of procurement other than tendering should be relatively skeletal compared to the detailed approach with respect to tendering proceedings.

197. The Commission then turned its attention to a proposal to include in article 37 a reference to the reliability of the supplier or contractor, analogous to the reference that had been included in article 36 with respect to request for quotations. In doing so, the Commission considered further the question that had been raised in the discussion of article 36 with respect to whether a mere reference to "reliability" would be sufficient, or whether it would be preferable to refer rather to a requirement that the supplier or contractor had to be "qualified". Differing views and concerns were expressed in this regard.

198. One view was that a mere reference to reliability would suffice, in particular because saying anything more, such as using the word "qualified", would raise the risk of importing into single-source procurement the full panoply of rules and procedures concerning proof of qualifications set out in articles 6 and 7, something which would be excessive in view of the expedited, less formal nature of request-for-quotations and single-source procurement. The contrary view, in support of using the expression "qualified" rather than "reliable", was that such a risk of importing to a disproportionate degree the procedures of article 6 should not be an actual concern since article 6 was merely an enabling provision that did not itself mandate the use of any particular degree of qualification procedures in any given case of procurement. It was again suggested that the more concrete risk in fact was that the use of any term other than "qualified" would sow uncertainty, confusion and an undesirable degree of subjectivity and risk of corruption in request-for-quotation and single-source procurement, since it would not be clear what criteria could be used to evaluate the reliability of suppliers and contractors. In response, this difficulty was characterized as essentially not an obstacle, since at any rate no criteria other than those mentioned in article 6 (2) could be legitimately used to measure the qualifications or reliability of suppliers and contractors, once it was clear that article 6 applied, no matter what the procurement method was.

199. The Commission then considered how the Model Law could take into account and reconcile the differing views and concerns that had been raised. One solution that was considered was to institute the desired degree of flexibility in articles 36 and 37 by authorizing the procuring entity to apply the criteria in article 6 (2) to request-for-quotations and single-source procurement to the extent possible or necessary. That approach was not followed, in particular because it was felt that it was unnecessary and inappropriate to refer in articles 36 and 37 to such flexibility since flexibility was sufficiently established in the enabling provisions of article 6.

200. Another possible approach was simply to avoid any mention in articles 36 and 37 of the qualification or, for that matter, of the reliability of suppliers and contractors, on the assumption that article 6 would apply and would provide the necessary degree of flexibility with respect to the extent of application of qualification criteria and procedures. This basic approach was found to be appealing. Yet in considering this approach, it was realized that it might necessitate a further revision of article 6, since it could not be assumed that article 6, in its present form, was directly applicable, even though that may have been the intent of the Working Group draft. In particular, it was pointed out that there appeared to be no general rule in article 6, applicable to all methods of procurement, requiring the procuring entity to enter into procurement contracts only with qualified suppliers and contractors; nor, for that matter, did article 6 contain an express definition of the notion of "qualified". In its express terms, article 6 merely authorized the procuring entity to assess the qualifications of suppliers or contractors, and to that end to seek information as to matters referred to in article 6 (2). This approach in article 6 did not raise a problem for tendering proceedings because article 29 (3) (a) completed the picture with respect to tendering proceedings by requiring the rejection of tenders submitted by suppliers or contractors deemed unqualified. However, no such rule requiring suppliers or contractors to be qualified under the pain of rejection was established for any of the procurement methods other than tendering, something that the Commission considered a gap in the Model Law that should be filled.

201. In order to fill that gap, while addressing the other concerns that had been raised, the Commission decided that article 6 needed to be amended further. That amendment would be aimed at: establishing clearly the rule that, no matter what the method of procurement, suppliers and contractors needed to be qualified in order to enter into a procurement contract with the procuring entity; providing a definition of "qualified"; and ensuring a sufficient degree of flexibility for the procuring entity as regards the extent to which qualifications were to be examined in particular procurement proceedings. The Commission endorsed this approach and referred the matter to the drafting group.

202. Subject to the above decision with regard to article 6, the Commission adopted article 37 unchanged.

CHAPTER V. REVIEW

203. The Commission noted the special character of chapter V in that it concerned matters that touched upon the established constitutional and administrative arrangements of States, and that for that reason States would differ with regard to the precise procedures and structures used to implement the right to review. It was further noted that the text appearing in brackets at various points in chapter V was intended to present alternatives and options to enacting States.

Article 38. Right of review

Paragraph (1)

204. The view was expressed that the requirement that the supplier or contractor suffer a "loss or injury" as a result of the procuring entity's breach of duty should be deleted in article 38 (1), as the breach of duty of the procuring entity should be a sufficient ground establishing the right of review for the supplier or contractor. However, the prevailing view was that it was a generally accepted principle of law that a cause of action required both breach

of an obligation and damage resulting therefrom, and that this principle would help to limit the extent of disruption of procurement proceedings resulting from claims for review.

205. The Commission adopted paragraph (1) unchanged.

Paragraph (2)

206. It was noted that the matter referred to in subparagraph (c) would now be encompassed in subparagraph (a), in view of the decision to move the provisions on restricted tendering to chapters II and IV. Accordingly, subparagraph (c) should be deleted. It was also noted that the reference in subparagraph (d) to article 28 (1) was mistaken and should be replaced by a reference to article 30 (1). Lastly, it was decided to add to the list of exemptions in paragraph (2) a reference to the omission referred to in article 21 (s). Subject to those modifications, the Commission adopted paragraph (2).

Article 39. Review by procuring entity (or by approving authority)

207. The Commission adopted article 39 unchanged.

Article 40. Administrative review

208. The Commission adopted article 40 unchanged.

Article 41. Certain rules applicable to review proceedings under article 39 [and article 40]

209. The Commission adopted article 41 unchanged.

Article 42. Suspension of procurement proceedings

210. The Commission adopted article 42 unchanged.

Article 43. Judicial review

211. The Commission adopted article 43 unchanged.

C. Report of the drafting group

212. The entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions taken by the Commission and revision to ensure consistency within the text and between language versions. The Commission, at its 510th to 512th meetings, held on 15 and 16 July 1993, considered the report of the drafting group. The Commission noted that, in addition to the changes agreed upon by the Commission, the drafting group had made a number of changes of a purely drafting nature.

213. It was noted that, in regard to article 6, paragraphs (6) and (7), the drafting group had found it difficult to implement the decision of the Commission (paras. 41-47). Pursuant to that decision, paragraph (7) provided the supplier or contractor with a right to correct material inaccuracies or

incompleteness in the qualification information, but only until the deadline of submission of tenders. The supplier or contractor therefore had no right to correct such deficiencies after the tenders had been opened, which in all probability was when the deficiencies would be discovered in procurement proceedings in which no prequalification had taken place. The drafting group suggested this paragraph would be workable if the right to correct was extended to give a reasonable time after the deadline for the submission of tenders or to give time for rectification until the conclusion of the procurement proceedings.

214. In considering this proposal a concern was raised that allowing the suppliers or contractors to correct information about qualifications after the opening of the tenders would open a door to abuse. A proposal was made that the matter would be sufficiently covered if the provision provided that the procuring entity could not disqualify a supplier or contractor for non-material inaccuracies or incompleteness, but that such a supplier or contractor may be disqualified if it failed to remedy the deficiencies promptly if requested to do so by the procuring entity. Under this approach, no opportunity is given to correct material defects in the qualification information after the deadline for submission of tenders. No such time limit is imposed for non-material defects, which may be corrected after the deadline. After deliberation, the Commission agreed to this proposal, which would be reflected in a new paragraph (6) (c). As a consequence, paragraph (7) was deleted.

215. It was noted that, in implementing the decision of the Commission to relocate article 22 to chapter 1 (para. 131), the drafting group found it appropriate to divide article 22 into two articles. A new article ("12 ter"), dealing with the language question addressed in article 22 (4), would provide that the prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations should be formulated in the official language of the enacting state and in a language customarily used in international trade, except where the procurement was to be limited to domestic suppliers or contractors. It was agreed that the provision would be formulated so as to take account of States in which one or more official languages were among those used in international trade.

216. In article 34 (9), the Commission noted that it would be necessary to delete subparagraph (d), in line with the decision concerning article 6 (1).

D. Adoption of the Model Law and recommendation

217. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group, 4/ adopted the following decision at its 512th meeting, on 16 July 1993:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

Noting that procurement constitutes a large portion of public expenditure in most States,

Noting that a model law on procurement establishing procedures designed to foster integrity, confidence, fairness and transparency in the

procurement process will also promote economy, efficiency and competition in procurement and thus lead to increased economic development,

Being of the opinion that the establishment of a model law on procurement that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Being convinced that the UNCITRAL Model Law on Procurement of Goods and Construction will significantly assist all States, including developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist,

1. Adopts the UNCITRAL Model Law on Procurement of Goods and Construction as it appears in annex I to the report of its current session;

2. Requests the Secretary-General to transmit the text of the UNCITRAL Model Law on Procurement of Goods and Construction, together with the Guide to Enactment of the Model Law, to Governments and other interested bodies;

3. Recommends that all States give favourable consideration to the UNCITRAL Model Law on Procurement of Goods and Construction when they enact or revise their laws, in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice.

E. Discussion of draft Guide to Enactment

218. The Commission, after adopting the Model Law, engaged in a discussion of the draft Guide to Enactment of the Model Law prepared by the Secretariat. At the outset, the Commission was agreed that it would be preferable for the Guide to be reviewed and adopted by the Commission itself, in the plenary and at the present session, in view of the important role that the Guide would play in assisting legislatures in preparing legislation based on the Model Law. The Commission agreed that it would request the Secretariat to finalize the Guide, in order to reflect the changes to the Model Law agreed upon at the present session and to take into account the suggestions made during the discussion of the Guide.

Introduction

219. It was suggested that, in view of the fact that the introduction might function as an executive summary of the Guide, it should be recast so as to sufficiently emphasize important principles and features of the Model Law. These included in particular: an explanation of the objectives of the Model Law; a brief description of the various methods of procurement available under the Model Law and the general rule of tendering as the norm; the role of procurement regulations; and the rule, subject to certain exceptions, of participation by suppliers and contractors without regard to nationality. It was observed that, with such a revision, the introduction would present an even stronger endorsement of the importance and value of the Model Law. It was also suggested that the purpose of the Guide as a background report to executive authorities (paras. 5-8) should be stressed in clearer terms.

Preamble

220. No changes were suggested.

Article 1

221. It was suggested that the Guide should emphasize that under the Model Law the scope of application of the Model Law could be delimitated based on procurement regulations only if the regulations were issued in a transparent and open way. It was suggested that this could be done by inserting after the second sentence of paragraph 2 under article 1 wording along the lines of "States excluding the application of the Model Law by way of procurement regulations should take note of article 5."

Articles 2 and 3

222. It was suggested that, in paragraph 2 under article 2, the factor in subparagraph (g) would be deleted in view of the scope of the factor in subparagraph (b). No changes were suggested under article 3.

Article 4

223. It was suggested that paragraph 1 should refer also to paragraph 9 of the introduction. Reference was made to the importance of the observation in paragraph 2 that, in urgent cases in which the procuring entity could choose to resort to procurement methods other than tendering, procurement should be limited to the quantities required to deal with the urgent circumstances.

Articles 5, 6 and 7

224. No changes were suggested.

Article 8

225. It was suggested to make it clearer that the reason that the margin of preference under article 29 (4) (d), and article 17, were being referred to in paragraphs 2 and 3 under article 8 was their importance to the rule of international participation set forth in article 8.

Article 9

226. It was suggested that language should be included drawing the attention of legislators to the fact that article 9 did not answer all the technical and legal questions raised by the use of EDI communications in the context of procurement proceedings and that other areas of the law would apply to ancillary questions such as the electronic issuance of a tender security, and other matters beyond the sphere of "communications" under the Model Law.

Articles 10 and 11

227. No changes were suggested.

Article 12

228. It was suggested that, for additional clarity in the last sentence of paragraph 1, the word "elsewhere" should be inserted before the words "in place". It was also suggested that the words "employees of public procuring entities" should be added after the words "Government officials", as the latter did not necessarily include the former.

Article 13

229. It was suggested that, because of its importance, article 13 merited a somewhat expanded discussion. In particular, it was suggested that, either here or in the introduction, the decision to express in the Model Law strong preference for tendering should be discussed, with particular reference to the objectives listed in the preamble. It was also observed that reference to "best value" in the last line of paragraph 1 should be deleted, since whether tendering was likely to provide the best value even in exceptional cases was a question of policy to be decided by the procuring entity.

Article 14

230. With regard to the second sentence of paragraph 1, it was suggested that the attention of States should be drawn to the possibility that, in cases in which procuring entities were unable to formulate specifications, before deciding to opt for an alternative method of procurement, they might consider whether the specifications could be prepared with the assistance of consultants. It was also suggested that the language of paragraph 1 refer to "non-feasibility" instead of to "inability" in line with the change in wording agreed in article 14 (1) concerning cases in which it was difficult or impossible for the procuring entity to finalize specifications.

Article 15

231. It was suggested that the Guide should refer to rule that procurements should not be subdivided in order to avoid use of tendering proceedings.

Articles 16 and 17

232. No changes were suggested.

Article 18

233. It was suggested that the second sentence of paragraph 1 should be revised, as it was unlikely that in all States the procurement law would specify all publications in which invitations to tender would be published. With regard to paragraph 3, it was suggested that reference to cases of high-value construction as grounds for resort to restricted tendering should be deleted, as this was not envisaged in the Model Law as a permissible ground. It was stated that the case would serve better as an example of where prequalification would be desirable.

Article 19

234. No changes were suggested.

Articles 20 and 21

235. No changes were suggested.

Article 22

236. It was suggested that the title should be shortened and changed so as to reflect the principles of objectivity and non-discrimination. It was also noted that the last sentence of paragraph 1 should be either deleted or recast as its meaning was unclear. It was suggested that paragraph 3 should be modified so as not to cast a negative light to the issuance of bilingual solicitation documents, since this was the practice in a variety of States having more than one official language. What needed to be stressed instead was that a supplier or contractor should be able to base its rights and obligations on either language version. It was observed that there could be less difficulty if it were made clear in the solicitation documents that both language versions were equally authoritative.

Article 23

237. The suggestion was made that the emphasis on the right of the procuring entity to modify the solicitation documents as "fundamental and necessary" was too strong and might be misread as encouraging modification of solicitation documents. The word "important" was suggested as an alternative.

Article 24

238. It was suggested that the reference to "any language" should be changed to "a language used in international trade".

Article 25

239. It was noted that in paragraph 2 it should be emphasized that the decision of the procuring entity to extend the deadline for submission of tenders was not discretionary and not subject to review. It was suggested that the last two sentences of paragraphs 3 and 4 should be redrafted or deleted.

Article 26

240. No changes were suggested.

Article 27

241. It was suggested that paragraph 6 should be expanded to reflect the change in the Model Law decided by the Commission concerning the point in time after which modification or withdrawal of the tender was subject to forfeiture of the tender security. Another suggestion was that the word "transferable" appearing in the second sentence of paragraph 6 should be replaced by a more appropriate word.

Article 28

242. No changes were suggested.

Article 29

243. It was observed that some of the wording used in paragraph 5 might be misread as recommending the widest possible application of margins of preference, when in fact the purpose of the Guide here was merely to call attention to the reasons for the use of margins of preference. To this end, it was suggested that the words "advantages of" be substituted by the words "reasons for".

Article 30

244. No changes were suggested.

Article 31

245. It was suggested that the Guide, in addition to referring to the problem of undesirable "auctioning off" of procurement contracts as a ground for prohibiting negotiations, should also mention that prices offered in expectation of negotiations were often higher.

Article 32

246. It was noted that the drafting of paragraph 3 would be reconsidered. It was suggested that, in paragraph 6, the words "should be in accordance" should be replaced by the words "shall be in accordance".

Introduction to chapter IV

247. It was suggested that the drafting of the third sentence should be reviewed, in particular the use of the words "to incorporate".

Article 33

248. No changes were suggested.

Article 34

249. It was suggested that the last sentence of paragraph 2 should be revised so as to make it clear that the use of the wider notification procedure should not be cast aside casually.

Article 35

250. It was noted that the wording in paragraph 1 referring to article 35 as a "skeleton provision" would be modified since it was not fully in line with the informal, relatively unregulated nature of competitive-negotiation proceedings. It was further suggested that paragraph 3 should be redrafted.

Article 36

251. It was observed that it would be useful to indicate that the procuring entity could use internationally recognized systems of terminology such as INCOTERMS.

Article 37

252. It was noted that the description of single-source procurement, as was the case for the description of request for quotations, was minimal and could be usefully expanded. It was also recalled that the introduction would be expanded to include a more detailed summary, in lay language, of the various types of procurement methods available under the Model Law. It was also suggested that in the context of discussion of article 37 the attention of legislators should be drawn to the applicability to single-source procurement of the general provisions of the Model Law, including article 11 on record requirements and the new article on the publication of notices of procurement contract awards.

Introduction to chapter V

253. It was suggested that in paragraph 7 it could be added that the procuring entity and the contractor or supplier were not precluded by the Model Law from submitting to arbitration, in appropriate circumstances, a dispute relating to the procedures in the Model Law. At the same time it was emphasized that the decision not to treat arbitration in the Model Law was a deliberate one, stemming from the rather narrow scope for arbitration in the procedures envisaged in the Model Law.

Article 38

254. It was suggested that in the second sentence of paragraph 1 the words "as such" should be deleted so as to make clearer the intended effect of article 38 to limit the right to review to suppliers and contractors. It was suggested that the third sentence should either be made clearer or deleted. The penultimate sentence in the same paragraph was questioned as merely paraphrasing the Model Law, something that raised the risk of diverse interpretations. It was also suggested that the present text should be modified so as to avoid suggesting that the degree of detriment required to have standing was a question of "capacity".

Article 39

255. It was noted that in the first sentence of paragraph 3 the word "promptly" would be inserted before the word "filed" and the words "and resolved" would be deleted. It was also noted that the points made in paragraph 8 would be amplified.

Article 40

256. It was observed that in the second sentence of paragraph 12 the word "large" should be deleted.

Article 42

257. It was observed that it should be explained in the Guide that article 42 struck a balance between the right of the supplier or contractor to have a complaint reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way. It was also noted that it might be made clearer that the overall period of suspension was not to exceed thirty days.

258. Subject to the implementation by the secretariat of the changes necessary in order to reflect decisions of the Commission on the Model Law, and the suggestions made by the Commission, the Commission adopted the Guide. The Commission agreed that the exact format in which the Model Law and the Guide would be published could be left to the Secretariat, subject to the procedures for publication of United Nations documents and the budgetary restrictions. The Commission agreed that, in the case that the two texts would be published in two separate documents, the attention of readers of one document should be drawn to the other by way of a footnote to be inserted in both documents.

F. Future work relating to the procurement of services

259. The Commission had before it a note by the Secretariat on possible future work on the elaboration of model statutory provisions on procurement of services (A/CN.9/378/Add.1). The note addressed the desirability and feasibility of preparing such model provisions, the differing considerations with respect to the procurement of services and the procurement of goods or construction, and the possible content of model statutory provisions. The note also presented the draft text of possible amendments to the UNCITRAL Model Law on Procurement of Goods and Construction that would be designed to expand its scope to cover the procurement of services.

260. As regards the desirability of preparing model provisions on the procurement of services, the note recalled that the Working Group had decided to limit the Model Law, at least initially, to the procurement of goods and construction, primarily because the procurement of services was governed by different considerations than those that governed the procurement of goods or construction. In this light the note suggested that, with the adoption of an UNCITRAL Model Law dealing with procurement of goods and construction, the Commission might consider it desirable to proceed with the preparation of provisions on procurement of services. Furthermore, it was noted that a number of States already considering enacting legislation on the basis of the Model Law had expressed the need for a comprehensive model for a legislative framework for procurement also covering the procurement of services. The view was expressed that since a number of States had already shown an interest in the development of model statutory provisions on the procurement of services, it would be opportune for the Commission to prepare such provisions without delay now that the Model Law had been adopted.

261. A concern was expressed, however, that the preparation of model statutory provisions on the procurement of services might conflict with the work being carried out under the auspices of the General Agreement on Tariffs and Trade (GATT) on expansion of the GATT Agreement on Government Procurement to cover services. It was stated that it might be more prudent to await finalization of the work in GATT so as to ensure compatibility between the two projects. A countervailing view was that there was no risk of conflict between the work being carried out in GATT because, while the work in GATT concerned general access to trade in services, work by the Commission would be focused on the question of how the procurement of services would be carried out. It was also pointed out that the Model Law already provided that, in case of a conflict,

treaty obligations of States would prevail. The prevailing view was that the Working Group should proceed with the preparation of draft provisions, while ensuring compatibility between the two projects, something that would be facilitated by the fact that GATT was scheduled to finalize its work in December 1993, while the Working Group would be presenting its work to the Commission in May 1994.

262. Differing views were expressed as to the best possible way in which the Commission should proceed in formulating the model provisions. One view was that, as recommended in the note by the Secretariat, an additional chapter, IV bis, should be added to the Model Law, dealing exclusively with the procurement of services. Another view was that the model provisions on services should be 'self-standing' since the Model Law on Procurement of Goods and Construction had already been adopted and was available to be used without any further revision. After deliberation, the Commission agreed that the two approaches were not mutually exclusive and that the draft provisions on services should be presented in a manner that was suitable both for States that had adopted the Model Law on Procurement of Goods and Construction, and for States considering simultaneous adoption of provisions for goods, construction and services.

III. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE

263. At its twenty-fourth session, in 1991, the Commission was agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group. 5/

264. At its twenty-fifth session, in 1992, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (ibid., paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange. 6/

265. At its current session, the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

266. The view was expressed that, in addition to preparing statutory provisions, the Working Group should engage in the preparation of a model communication agreement for optional use between EDI users. It was explained that most attempts to solve legal problems arising out of the use of EDI currently relied on a contractual approach. That situation created a need for a global model to be used when drafting such contractual arrangements. It was stated in reply that the preparation of a standard communication agreement for universal use had been suggested at the twenty-fourth session of the Commission. The Commission, at that time, had decided that it was premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, provisionally, to monitor developments in other organizations, particularly the European Communities and the Economic Commission for Europe. 7/ After discussion, the Commission reaffirmed its decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

267. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific consideration. It was also suggested that the Commission should set a time limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, the Working Group should discuss additional areas where more detailed rules might be needed.

268. The Commission reaffirmed the need for active cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core

legal body of the United Nations system in the field of international trade law, should play a particularly active role with respect to the legal issues of EDI. The Commission decided that the Secretariat should continue to monitor legal developments in other organizations such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE), the European Communities and the International Chamber of Commerce (ICC) and report to the Commission and its relevant Working Groups on the work accomplished within those organizations.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

269. The Commission, at its twenty-second session, in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken, and entrusted that task to the Working Group on International Contract Practices. 8/

270. The Working Group had commenced its work on the topic at its thirteenth session by considering possible issues of a uniform law. At its fourteenth and fifteenth sessions, the Working Group had examined draft articles 1 to 7 of the uniform law and further issues to be dealt with in a uniform law. At its sixteenth session the Working Group had examined draft articles 1 to 13 and at its seventeenth session draft articles 14 to 27 of the uniform law prepared by the Secretariat. The reports of those sessions of the Working Group were contained in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358 and A/CN.9/361.

271. At its current session, the Commission had before it the reports of the Working Group on the work of its eighteenth and nineteenth sessions (A/CN.9/372 and A/CN.9/374). The Commission noted that the Working Group had during its eighteenth session examined draft articles 1 to 8 and during its nineteenth session draft articles 9 to 17 of the draft Convention on International Guaranty Letters prepared by the Secretariat.

272. The Commission noted that the Working Group had requested the Secretariat to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 17 of the draft Convention. The Commission further noted that, during the eighteenth session of the Working Group, the United States of America had submitted draft rules on stand-by letters of credit on the assumption that independent guarantees and stand-by letters of credit would be dealt in separate parts of the future Convention. It was agreed at that session that the Working Group could appropriately determine whether there would be a need for such treatment in separate parts when it would be made clear which, and how many, provisions should be applicable exclusively to bank guarantees or to stand-by letters of credit.

273. The Commission expressed its appreciation for the valuable work done so far by the Working Group on a matter that was complex and on which few models existed. The Commission, however, also expressed its concern about the slow progress made by the Working Group so far and requested it to consider methods of carrying out its task more expeditiously. Several observations were made that the progress of work in the Working Group was negatively affected by reopening issues that had been considered and agreed upon and by submitting new proposals on settled questions. The Commission requested the Working Group to proceed with its work expeditiously so as to complete it before the twenty-eighth session of the Commission in 1995.

V. CASE LAW ON UNCITRAL TEXTS (CLOUT)

A. Introduction

274. Based on a decision by the Commission taken at its twenty-first session (1988), 9/ the Secretariat had established a system for collecting, and disseminating information on, court decisions and arbitral awards relating to the Conventions and Model Laws that had emanated from the work of the Commission. The acronym for the system was CLOUT ("Case law on UNCITRAL texts").

275. Currently, the following legal texts were covered by the system: The Convention on the Limitation Period in the International Sale of Goods (New York, 1974), and as amended by the Protocol of 1980; United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); UNCITRAL Model Law on International Commercial Arbitration (1985); and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).

276. The system would also cover other Conventions and Model Laws as they enter into force or were implemented by States, including the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); UNCITRAL Model Law on International Credit Transfers (1992); and the UNCITRAL Model Law on Procurement of Goods and Construction (1993).

277. The system relied on a network of national correspondents, designated by the States that were parties to one of the Conventions or have enacted legislation based on a Model Law. A national correspondent could be an individual, a governmental unit or body or a suitable non-governmental institution. The duty of national correspondents was to collect court decisions and arbitral awards, and prepare abstracts of them in one of the official languages of the United Nations. An abstract, normally up to one half of a page long, provided summary information about the facts and propositions of law in the decision or award, and enabled readers to decide whether it was worthwhile to obtain and examine the complete decision or award. The Secretariat stored the decisions and awards in their original form, translated the abstracts into the other five United Nations languages, and published the abstracts in the six United Nations languages.

278. The abstracts were published as part of the regular documentation of UNCITRAL under the identifying symbol A/CN.9/SER.C/ABSTRACTS/ followed by the consecutive number. The decisions and awards were available to any interested person upon request and against a fee for copying and sending them. A more detailed explanation of the system was contained in the document entitled "Case law on UNCITRAL texts (CLOUT), User guide" (A/CN.9/SER.C/GUIDE/1). The first compilation of twenty abstracts relating to the United Nations Sales Convention and the UNCITRAL Model Arbitration Law was published under the symbol A/CN.9/SER.C/ABSTRACTS/1.

279. The abstracts were subject to the copyright of the United Nations. According to the copyright notice, Governments and governmental institutions might reproduce or translate abstracts without permission, but were requested to inform the United Nations of such reproduction or translation. All requests by others for permission to reproduce or translate abstracts were to be referred to the United Nations Publications Board. The Board, in deciding on such requests in consultation with the UNCITRAL secretariat, would be guided by the objectives

of the system, which was to provide worldwide awareness in the application of UNCITRAL legal texts.

280. With a view to enhancing the usefulness of the system, the Secretariat intended to publish at an appropriate time separate indices for the texts covered by the system. Each index will be based on a classification scheme in the form of a "thesaurus" of issues that followed the order of the provisions of the respective text, with additional sub-categories of issues as appropriate.

B. Considerations by the Commission

281. The Commission noted with pleasure the issuance of the two first CLOUT publications. The conviction was expressed that the system will be beneficial in several respects. Among the benefits mentioned were a better understanding by practitioners of the statutory texts covered by the system, improved quality of teaching in those areas of international trade law, increased awareness about those texts, promotion of uniform interpretation, availability to the Commission of information about how the texts were understood and applied in the national laws, and an unprecedented reduction of costs and language barriers in the exchange of information on case law.

282. It was suggested that in the further elaboration of the system, and in particular in preparing the thesaurus, account should be taken of the need to facilitate searching for decisions relevant to a given issue.

283. It was considered that it would be useful to include the information gathered by the CLOUT system in the programmes of seminars and other training activities organized under the auspices of the Commission.

284. The Commission heard with interest information about a non-profit project established by the Centre for Comparative Legal Studies, a joint venture between the Italian National Research Council, the University "La Sapienza", Rome, and the International Institute for the Unification of Private Law (UNIDROIT), in the context of which a computerized database was established for case law relating to the United Nations Sales Convention and the Convention on the Limitation Period in the International Sale of Goods. The information in the database was arranged according to a thesaurus of issues that followed the order of provisions of the Conventions and included additional sub-categories of issues; in the preparation of that thesaurus use was made of a draft thesaurus prepared by the secretariat of the Commission. It was said that the Centre was ready to cooperate in the CLOUT system established by the Commission. It was noted that the Secretariat would explore possible ways of such cooperation in accordance with the purposes and policies underlying the system established by the Commission.

285. The Commission expressed its appreciation to the national correspondents and the Secretariat for their work relating to the system, urged States to cooperate with the Secretariat in the operation of the system and to facilitate the carrying out of the tasks of the national correspondents.

VI. FUTURE PROGRAMME OF WORK

A. Introduction

286. Pursuant to the decision by the Commission taken at the twenty-fourth session, the Secretariat organized, in the context of the twenty-fifth session of the Commission, the UNCITRAL Congress on International Trade Law around the theme "Uniform commercial law in the twenty-first century". The Congress was held from 18 to 22 May 1992 in the General Assembly Hall at United Nations Headquarters in New York.

287. One of the aims of the Congress was to provide participants, who included practising lawyers, government officials, judges, arbitrators and academics, with a forum in which to voice their practical needs as a basis for future work by the Commission and other formulating agencies.

288. At the current session the Commission had before it a note entitled "Proposals for possible future work made at the UNCITRAL Congress" (A/CN.9/378). The note listed topics on which proposals for the preparation of substantive legal texts had been made at the Congress. The note also listed other suggestions aimed at enhancing coordination with other agencies involved in international trade law, promoting uniformity in the interpretation of uniform texts and intensifying the dissemination of information concerning texts emanating from the Commission.

289. To facilitate decisions by the Commission on possible future work, the Secretariat prepared introductory notes on some of the topics suggested at the Congress. Those introductory notes, presented in addenda to document A/CN.9/378, dealt with the following topics: procurement of services (addendum 1, which was considered under the agenda item "New international economic order: procurement" (paras. 259-262)); guidelines for pre-hearing conferences in arbitral proceedings (addendum 2); assignment of claims (addendum 3); cross-border insolvency (addendum 4); and legal issues in privatization (addendum 5). It was noted that the Secretariat intended to present further similar notes on other topics discussed at the Congress.

B. Considerations by the Commission

1. UNCITRAL Congress

290. The Commission expressed its satisfaction with the discussions at the Congress and its appreciation for the excellent organizational work by the Secretariat. The Commission took note with satisfaction of the many favourable reports of, and positive reactions to, the Congress, including, for example, the publication of a special issue of a Spanish trade law journal dedicated to the activities of UNCITRAL. However, it noted with concern that the proceedings of the Congress had not yet been published and requested the Secretariat to do all it could to expedite their publication.

2. Pre-hearing conferences

291. At the UNCITRAL Congress, as well as at other forums discussing international arbitration, it was observed that the principle of discretion and flexibility in the conduct of arbitral proceedings might in some circumstances make it difficult for participants to predict the manner of proceeding and to prepare for the various stages of arbitral proceedings. In connection with such

observations, it was stated that those difficulties could be avoided or reduced by holding at an early stage of arbitral proceedings a "pre-hearing conference" between the arbitrators and the parties in order to discuss and plan the proceedings. Furthermore, it was suggested at the Congress that it would be useful to prepare guidelines for pre-hearing conferences.

292. Pursuant to the above discussion at the Congress, the Secretariat prepared for the Commission a note entitled "Guidelines for pre-hearing conferences in arbitral proceedings" (A/CN.9/378/Add.2), which described the practice of holding pre-hearing conferences, suggested that the Commission should prepare guidelines for pre-hearing conferences and gave a tentative outline of topics that might be addressed in such guidelines. In addition, the note considered possible future work by the Commission on the issues of multi-party arbitration and the taking of evidence in arbitration, and in particular the appropriateness of dealing with those issues in the context of guidelines for pre-hearing conferences.

293. Strong support was expressed in the Commission for undertaking the preparation of guidelines for pre-hearing conferences. It was observed that such guidelines would provide welcome assistance to arbitrators and parties both in deciding whether to hold a pre-hearing conference and in conducting such a conference. It was suggested that the guidelines should preserve the beneficial flexibility of arbitral proceedings and avoid suggesting solutions that would be complex, overregulate the proceedings or approximate arbitral proceedings to court proceedings. Some reservations were voiced about the usefulness of the suggested work on the ground that pre-hearing conferences could make arbitral proceedings more rigid than desirable, might lead to conflicts, and possibly present an administrative burden.

294. After deliberation, the Commission decided to proceed with the preparation of guidelines for pre-hearing conferences, for which the note prepared by the Secretariat would constitute a good basis.

295. Recalling that at its nineteenth session in 1986 it had taken the view that multi-party arbitration and the taking of evidence in arbitration gave rise to issues that merited further consideration, 10/ the Commission agreed that some issues in multi-party arbitration and the taking of evidence could usefully be dealt with in the guidelines, as suggested in the note. It was further agreed that, after completing work on guidelines, the Commission would consider whether any further work on multi-party arbitration and the taking of evidence would be necessary.

296. The Secretariat was requested to prepare for the twenty-seventh session of the Commission, in 1994, a draft of guidelines on pre-hearing conferences. The Commission planned to discuss the draft guidelines at the session in 1994, after considering draft model legislative provisions on procurement of services, and to adopt guidelines on pre-hearing conferences at that session or at the twenty-eighth session in 1995.

3. Assignment of claims

297. One of the topics proposed during the Congress for possible future work by the Commission was assignment of claims.

298. The Commission had before it a note prepared by the Secretariat on assignment of claims and related matters (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade; those issues were: differences among national

laws concerning the validity of assignments of claims; differing requirements for a valid assignment of a claim to be effective towards the debtor; conflicts of priority between the assignee and another person asserting a right in the assigned claim. The note suggested that a study should be prepared on the possible scope of uniform rules on assignment of claims and on possible issues to be dealt with in the rules.

299. It was observed that significant differences existed among national rules on assignment of claims and that it would be difficult to reach agreement on unified solutions. Furthermore, legal issues in the area of assignment of claims touched upon other areas of law, such as security interests and insolvency, that were not unified and where unification was unlikely to be achieved in the foreseeable future. It was further observed that the Governing Council of UNIDROIT had a few weeks ago decided that a study be prepared on the feasibility of a universal model law on security interests; any work by the Commission would thus be wasteful duplication of work. On the basis of those observations it was suggested not to undertake work on assignment of claims.

300. The prevailing view, however, was in favour of requesting the Secretariat to prepare a feasibility study as suggested in the note. It was stated in support of that view that more research and information was needed for the Commission to decide on the feasibility of any work of unification; it was the very purpose of the study to provide such information and to identify any particular area in which unification efforts appeared to be promising. Moreover, it was not to be viewed as a duplication of work if the Secretariat undertook such a feasibility study on assignment of claims in the face of the above decision of UNIDROIT which related to the vast and largely different area of security interests; obviously, the Secretariat would consult with UNIDROIT and other international organizations when preparing the study and would, if unification efforts were regarded as promising, discuss with UNIDROIT concrete measures of coordination and cooperation. A number of delegations reiterated their concern that duplication of efforts should be avoided. It was pointed out in response that, on the basis of the information in the Secretariat note and in the report of the Secretary-General of UNIDROIT, no duplication was likely to occur.

301. After deliberation, the Commission decided to request the secretariat to prepare, in consultation with UNIDROIT and other international organizations, a study on the feasibility of unification work in the field of assignment of claims and to decide at its twenty-seventh session, on the basis of that study, whether or not work should be undertaken by the Commission.

4. Cross-border insolvency

302. At the UNCITRAL Congress it was proposed that the Commission should consider undertaking work on international aspects of bankruptcy.

303. As a consequence of that proposal, the Commission had before it a note prepared by the Secretariat on cross-border insolvency (A/CN.9/378/Add.4). The note considered the following legal issues that might give rise to problems due to a lack of harmony among national laws: the effects of liquidation proceedings in one State on assets located in another State; cross-border judicial assistance in insolvency matters; the extent to which all creditors may participate in insolvency proceedings; priority rules in distribution of assets to creditors; extra-territorial effects of cross-border compositions; recognition of security rights in insolvency proceedings; and the impeachment of a debtor's transaction prejudicial to creditors. The note also provided a brief

description of previous work at the international level towards harmonization of laws in the area.

304. Concerns were expressed about the feasibility of a project to harmonize rules on international aspects of insolvency. It was said that other organizations that had initiated similar projects encountered many difficulties in reaching agreed solutions and that the texts prepared by those organizations had not led to the desired result or to wide acceptance. The view was expressed that, in light of those concerns, the Commission should not undertake work in this field of law.

305. The prevailing view, however, was that the practical problems caused by the disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions. It was stated that the reasons for the unsuccessful experience of other organizations should be carefully studied and taken into account in future deliberations of the Commission.

306. After deliberation, the Commission requested the Secretariat to prepare for a future session of the Commission an in-depth study on the desirability and feasibility of harmonized rules of cross-border insolvencies. The study should consider which aspects of cross-border insolvency law lent themselves to harmonization and what might be the most suitable vehicle for harmonization.

5. Legal issues in privatization

307. At the UNCITRAL Congress, a suggestion was made for the Commission to consider preparation of a legal guide on "privatization contracts", i.e., contracts by which State-owned enterprises were transferred to private parties. The purpose of such a guide would be to help States in the process of privatization as well as to protect the legitimate interests of private investors.

308. The Commission had before it a note entitled "Legal issues in privatization" (A/CN.9/378/Add.5). The note summarized the legislative and institutional framework needed for the implementation of privatization programmes and described some clauses specific to contracts for the sale of enterprises.

309. The Commission considered that the policies of States regarding privatization differed considerably and that, as a result, national laws to implement those policies did not lend themselves to unification. In addition, it was considered that many issues to be covered in those laws pertained to areas other than trade law. As a result of those considerations, it was concluded that the Commission should not undertake work concerning legislation relating to privatization.

310. As to legal issues in privatization contracts, the Commission considered that those issues depended on State policies and that solutions considered appropriate in one State might not be useful in others. Nevertheless, it was considered that the need for any work on those issues might be reconsidered, should the development of contract practices in that area so indicate.

6. Build, Operate and Transfer (BOT)

311. At the UNCITRAL Congress it was proposed that the Commission should consider undertaking work in the area of the Build, Operate and Transfer (BOT)

project financing concept. At the current session, the Commission had before it a note on possible future work (A/CN.9/378), in which the secretariat reported on the specific features of BOT and the work being undertaken on a note for the next session of the Commission on the desirability and feasibility of possible future work in this area. In this respect the Secretariat informed the Commission that it was closely monitoring the work by UNIDO on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT projects". The Commission noted with appreciation the efforts of the Secretariat and emphasized the relevance of BOT and the utility of the introductory note being prepared by the Secretariat.

7. Other proposals

312. It was reported that, as the result of a private initiative, an international moot arbitration competition based upon the legal texts formulated by the Commission was being organized, consisting of regional rounds, followed by an international final round scheduled to take place in March 1994. The purpose of the exercise is to promote and expand familiarity with and understanding of UNCITRAL legal texts.

VII. COORDINATION OF WORK

313. The Commission had before it a report of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/380). The report was prepared in order to update and supplement the report submitted at the twenty-third session of the Commission (A/CN.9/336), which covered activities of international organizations up to 15 February 1990. It was based on information available to the Secretariat from 15 February 1990 generally up to March 1993. In addition, it contained a new chapter summarizing the activities of international organizations on training and assistance.

314. In the context of the coordination of work, representatives of the Asian-African Legal Consultative Committee (AALCC) and the International Institute for the Unification of Private Law (UNIDROIT) made statements concerning the activities of their respective organizations. The Commission noted with satisfaction the close cooperation between it and those other organizations.

315. It was also observed that work at UNCTAD on a draft international code of conduct on the transfer of technology (see A/CN.9/380, para. 39), which involved mainly legal issues, had slowed down, and it was suggested that the Commission cooperate with UNCTAD with a view to expediting completion of this important project. It was also suggested that the Commission should monitor work at UNCTAD on restrictive business practices (see A/CN.9/380, para. 112), since the substantive issues arising with regard to this topic were of a legal rather than trade policy nature.

316. The Commission noted with appreciation the efforts of the Secretariat to monitor the activities of international organizations related to the harmonization and unification of international trade law.

VIII. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

317. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Arbitration Law"). The Commission had before it a note by the secretariat on the status of those Conventions and of the Model Law as at 13 July 1993 (A/CN.9/381).

318. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-fifth session (1992), the Slovak Republic deposited an instrument of succession to the ratification by the former Czechoslovakia of the Limitation Convention, to the accession of the former Czechoslovakia to the Protocol amending the Limitation Convention, to the ratification by the former Czechoslovakia of the United Nations Sales Convention and to the signature by the former Czechoslovakia of the Hamburg Rules.

319. The Commission noted with pleasure the accession of Bangladesh, Barbados and Turkey to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the deposit by Slovenia of an instrument of succession to the accession by former Yugoslavia to that Convention.

320. The Commission noted with pleasure that Mexico had acceded to the UNCITRAL Bills and Notes Convention. The Convention required eight more adherences for entry into force.

321. With respect to the UNCITRAL Arbitration Model Law, the Commission noted with pleasure that legislation based on the Model Law had been enacted in Peru and Tunisia.

322. Representatives and observers of a number of States reported that official action was being taken with a view to adherence to the United Nations Sales Convention, the Limitation Convention as amended by the Protocol, the Hamburg Rules, the UNCITRAL Bills and Notes Convention and to adoption of legislation based on the UNCITRAL Model Arbitration Law.

323. The Commission noted that there was some uncertainty as to whether newly formed States considered themselves bound by the Conventions to which their predecessor States were parties. It therefore called upon those newly formed States to clarify their position and to notify the Secretary-General accordingly.

324. It was agreed that, in addition to the useful document issued for each annual session of the Commission listing States that had become parties to legislative texts of the Commission, it would be useful for Governments to

receive during the year from the secretariat information on developments concerning those texts, including information, to the extent available, as to States that were considering adoption of those texts. In that connection, States were invited to designate a person or an organ that would receive such information.

325. The Commission recalled that the Hamburg Rules had entered into force on 1 November 1992. It was noted that, as of that date, the liability regime of the Hamburg Rules coexisted with liability regimes based on the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924) (Hague Rules) and that for goods carried in a given vessel the applicable regime depended on whether the goods were loaded or discharged in a State party to the Hamburg Rules or whether the transport document was issued in such a State. It was suggested that, in view of such undesirable diversity of liability regimes, it was recommendable to promote unification of regimes on the basis of the Hamburg Rules. In that context, the Commission was pleased to note that in resolution 47/34 of 25 November 1992 the General Assembly requested the Secretary-General to make increased efforts to promote wider adherence to the Convention.

326. The Commission was informed that in 1993 the secretariat of the Economic and Social Commission for Asia and the Pacific published a book entitled Guidelines for Maritime Legislation (Guidelines Volume I), Third edition (ST/ESCAP/1076), which commented upon the Hamburg Rules and the United Nations Terminal Operators Convention. As to the Hamburg Rules, the book advised States already parties to the Hague Rules, so as to modernize the existing regime, to add to the regime based on the Hague Rules certain provisions based on the Hamburg Rules. It was observed that this advice was prone to lead to disparity and inconsistency and ran counter to the recommendations contained in General Assembly resolutions. As to the United Nations Terminal Operators Convention, the book expressed the view that there was no need for legislation based on the Convention and that it was preferable to leave the liability issues covered by the Convention to be subject to contractual terms. It was observed that that view did not take into account that one of the principal reasons for the preparation of the Convention was the use by terminal operators of general contract conditions containing broad exclusions and limitations of liability.

327. The Commission heard expressions of serious concern about the type of advice given in the Guidelines, the fact that the advice given fostered continued disharmony of law, and the fact that the secretariat of the Commission was not invited to participate in the preparation of the book. It was considered to be unacceptable that a United Nations publication should express views that questioned in an unbalanced and biased way the advisability of adherence to Conventions prepared by United Nations diplomatic conferences.

328. The Commission called upon the Economic and Social Commission for Asia and the Pacific to undertake, in cooperation with the secretariat of the Commission, immediate revision of the Guidelines and to issue the revised publication within the shortest possible time.

IX. TRAINING AND TECHNICAL ASSISTANCE

329. The Commission had before it a note by the secretariat that set out the activities that had been carried out in respect of training and assistance during the period between the twenty-fifth and the current sessions of the Commission, as well as possible future activities in that field (A/CN.9/379). The note indicated that, since the statement of the Commission at its twentieth session (1987) "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past", 11/ the secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out.

330. As announced to the twenty-fifth session of the Commission in 1992, the Fifth UNCITRAL Symposium on International Trade Law was held on the occasion of the twenty-sixth session of the Commission, having taken place from 12-16 July 1993. As was the case at the Fourth Symposium in 1991, lecturers were invited primarily from delegations to the twenty-sixth session and from the Secretariat. In order to save on the cost of interpretation and to be able to increase the communication between participants themselves, the Symposium was held in French and English only. The travel costs of 20 participants from African countries were paid from the UNCITRAL Trust Fund for Symposia. In addition, 38 individuals attended without such financial assistance.

331. It was reported that, in view of the relative cost-effectiveness of national seminars compared to regional seminars, the secretariat had since the previous session emphasized the holding of strings of national seminars. The following national seminars had taken place since the previous session: (a) Bangkok, Thailand, held in cooperation with the Ministry of Foreign Affairs and attended by approximately 150 participants; (b) Jakarta and Surabaya, Indonesia, held in cooperation with the Ministry of Foreign Trade and attended by approximately 150 participants; (c) Lahore, Pakistan, held in cooperation with the Export Promotion Bureau and the Research Society for International Law and attended by approximately 75 participants; (d) Colombo, Sri Lanka, held in cooperation with the Attorney-General's Department, the Bar Association of Sri Lanka and the University of Colombo, and attended by approximately 160 participants; (e) Dhaka, Bangladesh, held in cooperation with the Export Promotion Bureau and the Bangladesh Institute of Law and International Affairs and attended by approximately 70 participants; (f) Kiev, Ukraine, held in cooperation with the Ministry of Foreign Economic Relations and attended by approximately 30 participants; (g) Warsaw, Poland, held in cooperation with the Polish Chamber of Commerce and attended by approximately 40 participants; (h) Rogaska Slatina, Slovenia, held in cooperation with the Law School of Maribor and Slovenian Government authorities and attended by approximately 90 participants.

332. It was noted that secretariat members had participated in and contributed to seminars and courses related to international trade law organized by other organizations such as the European Community (EC), the Organisation for Economic Cooperation and Development (OECD), the International Labour Organisation (ILO) and the London Court of Arbitration.

333. It was reported that the secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries and newly independent States. For the remainder of 1993, additional sites for seminars being planned included Argentina, Azerbaijan, Belarus, Brazil, Georgia, Kyrgyzstan, Mongolia, the Republic of Moldova and Uzbekistan. It was planned that additional requests for seminars that had been received from various African, Latin American and

Caribbean countries would be met in 1994. It was emphasized by the secretariat that its ability to implement these plans was contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for Symposia.

334. The Secretariat reported that direct legal technical assistance had been provided to a number of countries considering adoption of legislation or based on UNCITRAL texts. This frequently involved review of draft legislation and often took place in the form of an exchange in writing of observations and suggestions. Where considered more appropriate, and in case availability of funds permitted it, this type of assistance has also taken place in conjunction with seminars or through specific missions for that purpose.

335. It was also noted that, in line with the Secretary-General's policy of developing an integrated approach for the development assistance activities of the United Nations system, the Secretariat had initiated contacts with the United Nations Development Programme (UNDP), the main funding, planning and coordinating body of technical development assistance within the United Nations system. This approach particularly aims at an appropriate integration of UNCITRAL's technical assistance activities into the United Nations technical assistance programmes, in particular in the area of law reform. Contact had also been initiated with the Legal Advisory Services for Development (LASD), a recently established entity within the United Nations Secretariat. It was also noted that cooperation had been established with organizations outside of the United Nations system, for example, with the SIGMA programme of OECD in the area of procurement, and with the Pacific Economic Cooperation Council (PECC), regarding an action programme on harmonization of trade law in the Pacific basin.

336. The Secretariat reported that growing awareness of the UNCITRAL legal texts in many countries, in particular developing countries and newly independent States, was resulting in increased requests for technical assistance from individual Governments and regional organizations. It was also noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. Particular attention was drawn in this respect to the fact that the amount of funds needed for UNCITRAL training and technical assistance in the area of international trade law were comparatively small while the benefits to be drawn from modernization and progressive harmonization of legal rules in the area of international trade were considerable.

337. Of particular value had been the contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis, because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such contributions had been received from Canada and Finland. In addition, the annual contributions from France and Switzerland had been used for the training and technical assistance programme. Financial contributions had also been made by Cyprus. A specific contribution to the funding of the Fifth UNCITRAL Symposium had been received from Denmark. Yet, while the demand for training and technical assistance was increasing sharply, the availability of funds had actually diminished.

338. The Commission expressed its appreciation to all those who had participated in the organization of UNCITRAL seminars, and in particular to those that had given financial assistance to the programme of seminars and the UNCITRAL Trust Fund for Symposia. The Commission also expressed its appreciation to the Secretariat for its efforts to conduct an expanded programme of seminars and symposia. Recognizing the crucial importance of training and technical assistance as one of the major vehicles of the UNCITRAL dissemination and

communication system, the Commission noted the need for States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands for training and technical assistance, especially in developing countries and newly independent States. In addition, the need was noted for increased cooperation and coordination with development assistance agencies, particularly those within the United Nations system.

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

339. The Commission took note with appreciation of General Assembly resolution 47/34 of 25 November 1992 on the report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session. In particular, the Commission took note of the request by the General Assembly, expressed in paragraph 12 of resolution 47/34, that the Fifth Committee, in order to ensure full participation by all Member States, continue to consider granting travel assistance, within existing resources, to the least developed countries that are members of the Commission, as well as, on an exceptional basis, to other developing countries that are members of the Commission at their request, in consultation with the Secretary-General, to enable them to participate in the sessions of the Commission and its working groups. The Commission further took note of the recommendation of the General Assembly, expressed in paragraph 13 of resolution 47/34, that the Commission pay special attention to the rationalization of the organization of its work and consider all possibilities for rationalization, in particular the holding of consecutive meetings of its working groups, and of the Assembly's request, in paragraph 14 of the same resolution, that the Secretary-General submit a report on the implementation of paragraphs 12 and 13 to the Assembly at its forty-eighth session.

340. The Commission considered the recommendation of the General Assembly contained in paragraph 13 of resolution 47/34. It was observed that the Commission had on three previous occasions, at its twenty-first session (1988), at its twenty-third session (1990) and at its twenty-fifth session (1992), considered the rationalization of its working methods, including the issue of whether the holding of consecutive meetings for its working groups was practicable and whether it could result in savings on the cost of the travel expenses for delegations to UNCITRAL meetings. The Commission had concluded that the holding of consecutive meetings for its working groups was impracticable. It was noted that because of the nature of the work assigned to each working group, delegations were normally composed of different experts. The holding of consecutive working group meetings would not result in a lesser number of experts travelling to such meetings and would not therefore result in savings on travel costs for delegations. It was further observed that even where the same experts might be able to travel to more than one working group meeting, the length of time that the experts might be required to be away from their duty stations, if working group meetings were to be consecutive, might be too long. Many experts might not be able to afford long periods of absence from their work. Moreover, it was observed that such a practice might encourage States to keep the same experts already attending one working group meeting for the following one, notwithstanding that those experts might not be the appropriate ones, to the detriment of the work of the Commission.

341. The Commission further observed that the holding of consecutive working group meetings would not result in saving on staff travel costs since different members of the UNCITRAL secretariat were normally assigned to service each working group. The members of the secretariat were customarily involved in the preparation of background research studies analysing various aspects of the subject under consideration by the working group to which they were assigned. It was noted that it would be impracticable to assign a member of staff who had not been involved in the preparation of documents relating to a particular working group to service that working group. The holding of consecutive working group meetings would not therefore result in a reduction in the number of members of the secretariat travelling to such meetings. It was suggested that the upcoming working group sessions, with two instances of consecutive meetings

(see paras. 345-347), would provide an opportunity for witnessing the practical effects of consecutive meetings and would in all likelihood demonstrate the above disadvantages to the work of the Commission.

342. In the context of the discussion on the rationalization of the work of the Commission, it was emphasized that a rational and successful use of conference resources required the availability of the pre-session documents in all official languages at a sufficiently early time so as to allow for consultations within the given countries. It was noted with concern that many documents for the current and for recent sessions had not been available well in advance of the session, largely due to the severe shortage of human resources in the Secretariat. The Commission was agreed that all efforts should be made to remedy that situation, in particular by allowing exceptions to any hiring freeze or by otherwise recruiting additional staff.

B. Bibliography

343. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/382).

C. Date and place of the twenty-seventh session of the Commission

344. It was decided that the Commission would hold its twenty-seventh session from 31 May to 17 June 1994 in New York.

D. Sessions of the working groups

345. It was decided that the Working Group on Electronic Data Interchange would hold its twenty-sixth session from 11 to 22 October 1993 at Vienna and its twenty-seventh session from 28 February to 11 March 1994 in New York.

346. It was decided that the Working Group on International Contract Practices would hold its twentieth session from 22 November to 3 December 1993 at Vienna and its twenty-first session from 14 to 25 February 1994 in New York.

347. It was decided that the Working Group on the New International Economic Order would hold its sixteenth session from 6 to 17 December 1993 at Vienna and, if needed for the completion of its work on procurement of services, would hold its seventeenth session from 14 to 25 March 1994 in New York.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307) and 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995, while the term of those members elected at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998.

2/ The election of the Chairman took place at the 493rd meeting, on 5 July 1993, the election of the Vice-Chairmen at the 500th meeting, on 8 July 1993, and the election of the Rapporteur took place at the 496th meeting on 6 July 1993. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970 (United Nations publication Sales No. E.71.V.1), part two, I, A, para. 14).

3/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

4/ The following table indicates new article numbers assigned to the provisions of the UNCITRAL Model Law on Procurement of Goods and Construction upon adoption by the Commission.

Number of article in Model Law	Number of draft article before the Commission
Preamble	Preamble
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11 (1) (a) to (h)	11 (1) (a) to (h)
11 (1) (i) and (j)	11 (1) (j) and (k)
11 (1) (k)	new
11 (2) to (4)	11 (2) to (4)
12	new
13	12
14	22 (1), (2), (3)
15	22 (4)
16	13
17	14
18	new
19	15
20	16
21	17
22	18 (1) and (2)
23	19
24	20
25 (a) to (l)	21 (a) to (l)
25 (m)	new

Number of article in Model Law	Number of draft article before the Commission
25 (n) to (z)	21 (m) to (y)
26	23
27	24
28	25
29	26
30	27
31	28
32	29
33	30
34	31
35	32
36	33
37	partly new and partly based on 18 (3)
38	34
39	35
40	36
41	37
42	38
43	39
44	40
45	41
46	42
47	43

5/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 306-317.

6/ Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

7/ Ibid., Forty-sixth Session, Supplement No. 17 (A/46/17), para. 316.

8/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

9/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 98-109.

10/ Ibid., Forty-first Session, Supplement No. 17 (A/41/17), paras. 254-258.

11/ Ibid., Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

ANNEX I

[Original: Arabic/Chinese/English/
French/Russian/Spanish

UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement of goods and of construction so as to promote the objectives of:

(a) maximizing economy and efficiency in procurement;

(b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;

(c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;

(d) providing for the fair and equitable treatment of all suppliers and contractors;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) procurement involving national defence or national security;

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

Article 2. Definitions

For the purposes of this Law:

(a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;

(b) "procuring entity" means:

(i) Option I for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (the enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity; (the enacting State may include additional categories of goods)

(d) "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 30 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement entered into by this State with an intergovernmental international financing institution, or

(c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

Article 5. Public accessibility of legal texts

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Article 6. Qualifications of suppliers and contractors

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

(i) that they possess the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(ii) that they have legal capacity to enter into the procurement contract;

(iii) that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) that they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8 (1) and 32 (4) (d), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false.

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete.

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 7. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 23 (1) (a) to (e), (h) and, if already known, (j), as well as the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(e) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 8. Participation by suppliers or contractors

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 9. Form of communications

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 29 (2) (a), 30 (1) (d), 32 (1), 33 (3), 35 (1) and 37 (1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to article 32 (4) (d);

(f) if all tenders were rejected pursuant to article 33, a statement to that effect and the grounds therefor, in accordance with article 33 (1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 8 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(k) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 31 (3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 31 (3), the portion of the record referred to in subparagraphs (c) to (g), and (k), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a

tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (k), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

Article 12. Public notice of procurement contract awards

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

Article 13. Inducements from suppliers or contractors

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

Article 14. Rules concerning description of goods or construction

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design,

type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation or proposals, offers or quotations;

(b) due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

Article 15. Language

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. Methods of procurement

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) A procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20, and, if it does, it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) because of the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 13, 32 (3) or 33, and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods or construction, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impractical to use other methods of procurement because of the time involved in using those methods.

Article 18. Conditions for use of restricted tendering

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods or construction, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods or construction to be procured.

Article 19. Conditions for use of request for quotations

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity and for which there is an established

market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

Article 20. Conditions for use of single-source procurement

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods or construction are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) the procuring entity, having procured goods, equipment or technology from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 32 (4) (c) (iii), provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 21. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders, the procuring entity shall not be required to employ the procedures set out in articles 22 (2), 23 (1) (h), 23 (1) (i), 23 (2) (c), 23 (2) (d), 25 (j), 25 (k), 25 (s) and 30 (1) (c) of this Law.

Article 22. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation.

Article 23. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity, and place of delivery, of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6 (1) (b);

(e) a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8 (1), as the case may be;

(f) the means of obtaining the solicitation documents and the place from which they may be obtained;

(g) the price, if any, charged by the procuring entity for the solicitation documents;

(h) the currency and means of payment for the solicitation documents;

(i) the language or languages in which the solicitation documents are available;

(j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(c) the currency and terms of payment for the prequalification documents;

(d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

Article 24. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

Article 25. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32 (6);

(c) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with article 14, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 32 (4) (b), (c) or (d) and the relative weight of such factors;

(f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) if suppliers or contractors are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes;

(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 27, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) if a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) the manner, place and deadline for the submission of tenders, in conformity with article 28;

(o) the means by which, pursuant to article 26, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) the period of time during which tenders shall be in effect, in conformity with article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(r) the procedures to be followed for opening and examining tenders;

(s) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 32 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(u) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) notice of the right provided under article 42 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 33, a statement to that effect;

(y) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 35, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 26. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

SECTION II. SUBMISSION OF TENDERS

Article 27. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 28. Submission of tenders

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 26, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope.

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality.

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 29. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

Article 30. Tender securities

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such suppliers or contractors;

(b) the solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(d) prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) the procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;

(ii) failure to sign the procurement contract if required by the procuring entity to do so;

(iii) failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest:

(a) the expiry of the tender security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) the termination of the tendering proceedings without the entry into force of a procurement contract;

(d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 31. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

Article 32. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 13.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or

construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods being offered by suppliers or contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 25 (s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 33 (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

Article 33. Rejection of all tenders

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. The procuring entity shall upon request communicate to any supplier or

contractor that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all suppliers or contractors that submitted tenders.

Article 34. Prohibition of negotiations with suppliers or contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

Article 35. Acceptance of tender and entry into force of procurement contract

(1) Subject to articles 32 (7) and 33, the tender that has been ascertained to be the successful tender pursuant to article 32 (4) (b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 29 (1) or the period of effectiveness of tender securities that may be required pursuant to article 30 (1).

(4) Except as provided in paragraphs (2) (b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted

to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 32 (4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 33 (1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. Two-stage tendering

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 13, 32 (3) or 33 concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 32 (4) (b).

Article 37. Restricted tendering

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 18 (a), it shall solicit tenders from all

suppliers and contractors from whom the goods or construction to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18 (b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

Article 38. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Article 39. Competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to

all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

Article 40. Request for quotations

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

Article 41. Single-source procurement

In the circumstances set forth in article 20 the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER V. REVIEW*

Article 42. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 43 to [47].

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* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 16 to 20;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article 33 (1) to reject all tenders;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38 (2);

(e) an omission referred to in article 25 (t).

Article 43. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by the head of the approving authority, as the case may be).

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

Article 44. Administrative review*

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43 (5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43 (4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]** one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

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* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

** Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

Article 45. Certain rules applicable to review proceedings under article 43 [and article 44]

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 46. Suspension of procurement proceedings

(1) The timely submission of a complaint under article 43 [or article 44] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 47. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 43 [or 44].

ANNEX II

List of documents before the Commission at its twenty-sixth session

A. General series

A/CN.9/370	Provisional agenda
A/CN.9/371	Report of the Working Group on the New International Economic Order on the work of its fifteenth session
A/CN.9/372	Report of the Working Group on International Contract Practices on the work of its eighteenth session
A/CN.9/373	Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-fifth session
A/CN.9/374	Report of the Working Group on International Contract Practices on the work of its nineteenth session
A/CN.9/375	Draft Guide to Enactment of UNCITRAL Model Law on Procurement
A/CN.9/376 and Add.1-2	Model Law on Procurement - Compilation of Comments by Governments
A/CN.9/377	Procurement - Proposed amendments to the draft Model Law on Procurement
A/CN.9/378 and Add.1-5	Possible Future Work
A/CN.9/379	Training and Technical Assistance
A/CN.9/380	Current Activities of International Organizations Related to the Harmonization and Unification of International Trade Law
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B. Restricted series

A/CN.9/XXVI/CRP.1 and Add.1-13	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session
A/CN.9/XXVI/CRP.2	Draft Model Law on Procurement - Proposal by United States of America concerning Article 4

A/CN.9/XXVI/CRP.3	Draft Model Law on Procurement - Proposal by Canada concerning Articles 9 (1) and 25 (5)
A/CN.9/XXVI/CRP.4 and Add.1-4	Report of the drafting group
A/CN.9/XXVI/CRP.5	Draft Model Law on Procurement - Proposal by the Inter-American Development Bank concerning restricted tendering
A/CN.9/XXVI/CRP.6	Draft Model Law on Procurement - Adoption of the Model Law and recommendation

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